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COORDINATION AND CONVENTION AT THE FOUNDATIONS OF LAW

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Two fundamental and intuitively plausible theses dominate philosophical reflection on the nature of law and adjudication:

The Normativity Thesis: Law is a form of practical reasoning; like morality and prudence, it defines a general framework for practical reasoning. We understand law only if we understand how it is that laws give members of a community, officials and law-subjects alike, reasons for acting. Thus any adequate general theory of law must give a satisfactory account of the normative (reason-giving) character of law and must relate the framework of practical reasoning defined by law to the framework of morality and prudence.

The Social Thesis: Law is a social fact; what is and what is not to count as law is a matter of fact about human social behavior and institutions which can be described in terms which do not entail any evaluation of the behavior of institutions. We understand law only if we understand it as a kind of social institution which can be said to exist only if it is actually in force and directs human behavior in the community. Any adequate general theory of law must give a satisfactory account of law as a social phenomenon.

These two theses set the agenda for much of philosophical jurisprudence, both because they seem fundamental and because they are potentially in conflict. That is, there are available interpretations of each thesis which would make them incompatible. The history of philosophical jurisprudence is, in part, the history of attempts to modify and interpret these

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theses in the hope of reconciling them in a coherent general theory of law. Classical natural law and classical positivist theories do so by giving theoretical primacy to one thesis or the other and trying to tailor the remaining thesis to fit. No historically important theory of law completely rejects either thesis; each tries to come to terms with and explain the intuitive appeal of both. Perhaps the most successful recent attempt to reconcile them is Hart's theory of law, the key to which is his doctrine of the rule of recognition. According to Hart, the validity (and so the normative significance) of ordinary rules of law can be traced ultimately to a set of criteria of validity which exist not as valid rules (identified by some further rule of validity) but as social rules embedded in the law-identifying and law-interpreting activities of officials, legal practitioners, and perhaps others. This potentially complex, ordered set of criteria of validity is the rule of recognition. The crucial insight of this doctrine is that law rests, at its foundations, on a special and complex custom or convention.[1] It is my contention that this notion of convention, when properly understood, successfully bridges the gap between social fact and genuine obligation—reconciling the two theses—because a convention is both a social fact *and* a framework of reasons for action.

The importance of Hart's achievement, however, has not been fully appreciated, because his analysis of conventions ("social rules" as he less precisely calls them) is open to serious objections. It has been argued that Hart, like the classical positivists, has in fact failed adequately to account for the normativity of law, giving too much prominence to the social thesis. The only way adequately to account for the law's characteristic normativity, it is maintained, is to forge a more direct link between standards of law and principles of critical (as opposed to merely conventional) morality. But this conclusion is too hasty. Hart's basic insight can be preserved, and the wholesale incorporation of critical morality into universal conditions for the existence of law can be resisted, if a more adequate analysis of the bridge notion of convention can be devised. Elements of Hart's doctrine of the rule of recognition suggest such an analysis. The task of this essay is to isolate these elements, to give them more systematic formulation (adapting to the jurisprudential context recent work in the theory of coordination games),[2] and to show how the reconstructed doctrine of the rule of recognition meets and answers the most serious objections that have been raised against it. My view is not

[1] H. L. A. Hart, The Concept of Law ch. 6 (1961).

[2] See Thomas Schelling, The Strategy of Conflict (1960); David K. Lewis, Convention: A Philosophical Study (1969); and Edna Ullmann-Margalit, The Emergence of Norms ch. 3 (1977).

that these objections fail to point out serious problems with Hart's formulation of the conventionalist doctrine but that they can be met by a reformulation of that doctrine. The main strategy of this essay is to shift the focus of the doctrine *away from* the regularities of behavior and attitude which Hart believes "constitute" the rule of recognition *to* the strategic context, the context of practical reasoning, in which such regularities take on normative significance.

To this end, Section 1 sets the stage by describing the jurisprudential context in which the problems about the rule of recognition arise. I point out important ambiguities in Hart's account and suggest an interpretation of the doctrine which provides a springboard for a more adequate analysis of social rules. Section 2 develops the analysis against the background of recent work in the theory of coordination games. Sections 3 and 4 argue that this analysis is well suited to certain jurisprudential contexts. In Section 5 I argue that the doctrine of the rule of recognition reconstructed along suggested lines successfully meets the serious objections outlined in Section 1 and thus provides a sound basis for an illuminating reconciliation of the normativity and social theses.

1. Judicial Custom: The Rule of Recognition

A

Laws are rules or standards differing from other rules and standards in that they exist only if they belong to a system which is effective, or in force, in a community and are related in important ways to certain basic institutions.[3] Different theories of law single out different basic institutions or give different accounts of the relations between laws and these basic institutions, but each recognizes at some point this institutional character of law. Positivist jurisprudence gives theoretical primacy to this feature, insisting that the existence or identity of a standard of law (i.e., its authority or validity) is entirely a function of its relationship to the activities of primary institutions of the legal system. Thus positivists in the tradition stemming from Bentham locate the bases of identity of laws (the criteria of validity) in matters of social fact, thereby rejecting the view that the validity of a law is a function of its truth or moral soundness. Bentham, for example, directed all inquiries regarding the validity of laws to the facts of explicit (or, under carefully defined circumstances, implicit) law-making activities of a sovereign whose power rests on the habit of

[3] This is argued convincingly by Joseph Raz in Practical Reason and Norms chs 4.2 & 4.3 (1975). See also Joseph Raz, The Authority of Law ch. 6 (1979). But it is not a doctrine unique to positivist jurisprudence. It is central, for example, to the Thomist theory of law ("human law") as well; see Thomas Aquinas, Summa Theologica I-II,90, and 95a1.

obedience of the population. Hart shifts attention from law-*making* to law-*applying* institutions.[4] The rule of recognition, the fundamental criterion of validity in a legal system, consists in the practice of law-applying officials; and the authority (the reason-giving or duty-generating force) of the rule of recognition rests on its being viewed by officials and other participants in the legal enterprise as "a public, common standard of correct judicial decision."[5] However, Hart's doctrine needs clarification.

B

First, to speak of a *single rule* of recognition suggests that the practice in question is relatively simple, capable of being formulated in a single discrete criterion which specifies a simple "pedigree test" of validity. Ronald Dworkin's original "Model of Rules" paper articulates a set of very powerful reasons for abandoning this simplified understanding of the rule of recognition.[6] The law-identifying and law-applying practice at the foundations of a legal system is an exceedingly complex affair, not reducible to a single *rule,* let alone to a simple pedigree test defined in terms of publicly accessible social facts.

Hart, I believe, would not resist this suggestion, though it, too, stands in need of clarification. We must distinguish between the *content* of criteria of validity and their *conditions of existence* or *authority*. (I say "authority" because, for Hart, to say that a rule exists is to say, or to imply contextually, that [at least some of] those falling within the scope of the rule have, in virtue of that fact, reason to act in a certain way.) Now it is essential to Hart's doctrine that the *latter* be a matter of social fact: The authority of the rule of recognition must rest exclusively on the social facts of law-applying practice and the attitudes of officials associated with this activity. But it is a mistake to assume that the criterion of validity in its *content* consists exclusively in a social fact (pedigree) test. What distinguishes prelegal societies from societies which enjoy developed legal systems, according to Hart, is not a pedigree-type rule of recognition but the existence of tribunals for the orderly application of law and resolution of disputes that arise under law, whose determinations are regarded as authoritative.[7] This leaves the door open for a weaker social thesis which

[4] The difficulties caused by treating law-making institutions as primary are discussed by Raz in Practical Reason and Norms, *supra* note 3, at 129–31.

[5] Hart, *supra* note 1, at 112.

[6] Ronald Dworkin, Taking Rights Seriously ch. 2 (paperback ed. 1978). See also Lloyd L. Weinreb, Law as Order, 91 Harv. L. Rev. 924–26 (1978), although Weinreb goes further than I wish to go when he says, "There is no rule. There is only the fact that our discussions about the law do come to an end."

[7] Hart, *supra* note 1, ch. 5.3.

permits appeal to moral argument at certain points in the process of identifying standards of law. Of course, it is possible that judicial practice will follow a simple pedigree test, but modern legal systems are likely to include other criteria as well—criteria which may even include directions to officials to look, in some cases, to critical morality.[8] Thus any account of judicial custom which is adequate for Hart's purposes must accommodate the complexities just noted.

C

Turning to Hart's view of the authority of the rule of recognition, we find a set of interpretive problems which, when resolved, intensify the call for a fuller analysis of the notion of custom on which Hart relies. Note first that in the ordinary law-applying activities of judges, acceptance of the rule of recognition, according to Hart, is evidenced by the judge's implicit appeal to the rule, a rule which is "constituted by" the social facts of official behavior and attitudes. But to what exactly does the judge appeal? There seem to be two possibilities. Either (*a*) the judge appeals to the *normative* proposition requiring that the rules and standards in question be treated as valid law (e.g., the proposition: enforce all of Rex's enactments), or (*b*) the judge appeals to the *descriptive* proposition asserting that the corresponding social facts of official practice obtain (e.g., the proposition: Rex's enactments are regularly applied and enforced, etc.) Surely, at this level the appeal is to the normative proposition. The judge, taking the "internal attitude" to the rule, appeals implicitly to the rule as *justification* for his use of the legal standards that figure in his argument.[9] However, when the existence of the rule of recognition itself is challenged, the judge, according to Hart, is forced to take the "external point of view."[10] In so doing, the judge need only point to the facts of the practice that constitute the rule. The position of the judge at this point seems to be no different, in Hart's view, from that of an entirely uninvolved legal anthropologist. Each simply records the facts of official behavior and attitude which thereby establish the existence of the rule. And, Hart adds, with the citing of these facts, all questions of legal justification of the judge's decisions come to a natural end. Further questions of justification, of course, are in order, but these are no longer legal questions but, rather, questions concerning the moral status of the rule of

[8] See Jules Coleman, Negative and Positive Positivism, 11 J. Legal Stud., this issue; also E. Philip Soper, Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute, 75 Mich. L. Rev. 473, 511 (1977); and David Lyons, Principles, Positivism, and Legal Theory, 87 Yale L. J. 415, 424 (1977).

[9] Hart, *supra* note 1, at 102.

[10] *Id.* at 107, 245.

recognition or of the standards it identifies.[11] Unsatisfactory answers to these further questions do not undermine claims regarding the existence or authority of the rule or the legal justification of decisions applying standards properly identified by reference to it.

This doctrine is puzzling; many have thought it arbitrary and ad hoc.[12] Why is the judge—who up to this point has been concerned with offering reasons for his decisions and for his choice of standards to ground his decisions—suddenly forced to take up the point of view of the uninvolved external observer? Furthermore, since Hart's account of legal obligation and validity rests on his account of the existence and normative force of social rules, his success in accounting for the normativity of law depends on the success of his account of the reason-giving character of social rules (most important, the rule of recognition). But the forced shift to the external observer's perspective threatens to undermine completely this objective.

These puzzles are caused, I believe, by the fact that Hart uses the terms "internal" and "external" to mark several different distinctions which cut across each other, without fully recognizing or acknowledging this fact. Compare again the judge and the legal anthropologist. Both take the external point of view in the sense that neither makes *use* of the rule (e.g., by appealing to it to support some further normative judgment), but, rather, each mentions or talks *about* the rule. Thus there is a minimal distinction between internal/external which simply marks the difference, as it were, between the "use" and the "mention" of the rule. However, although both the judge and the legal anthropologist refer to the same set of social facts when mentioning/talking about the rule, the objectives or perspectives of the two differ in important respects. Whereas the legal anthropologist merely records these social facts, the judge appeals to them in the course of *defending* his claim of a duty to follow the rule. The anthropologist takes the external observer's view of these facts, but the judge cannot take that view without failing to meet the challenge he faces. Thus the judge must still take the point of view of one concerned to provide *justifying grounds* for his decision. This marks a different distinction between internal/external (we might call it the reasons-regarding/non–reasons-regarding distinction). But, when Hart insists that the judge, to meet the challenge to the rule of recognition, must take the external point of view, he must surely mean to assert more than merely that the judge must move from use to mention. Hart seems to hold, furthermore, that the

[11] *Id.* at 104–5.

[12] See, for example, Rolf Sartorius, Hart's Concept of Law, in More Essays in Legal Philosophy 151–61 (Robert S. Summers ed. 1971); also Iredell Jenkins, Social Order and the Limits of Law 179 (1980).

judge must appeal now, not to the normative proposition (since that is precisely what is being challenged), but to the *social facts* of the practice, but—and this is the key—from the reasons-regarding point of view. That is, Hart does not cut off *all* questions of justification at this point; rather, he insists that the justification must be of a certain sort. At bottom his claim is that the authority of criteria of validity ultimately rests not on the justice, correctness, or truth of the criteria as a matter of critical morality but, rather, on convention.[13] However, we must hasten to add, this is not to say that the official duties generated by the rule of recognition are duties which people simply *believe* they have: They are, according to Hart, genuine duties.

Now we face a philosophical, rather than merely an exigetical, puzzle: How is it that the fact of the behavior, beliefs, and attitudes of officials generate genuine duties for those officials? Consider the judge whose appeal to the alleged rule of recognition is challenged. Why should the fact that *other* officials follow the rule, and think *he* ought to follow it, give him any reason to do so? He might reply that he is among those who accept the rule; so when viewed from the internal point of view, he, like the others, has reason to follow it. However, this reply begs the question: After all, it is the facts of the practice, when viewed from *outside* the practice, that are supposed to give the judge reason to comply. Thus Hart, having brought us this far, fails to give us an account of how the facts of judicial practice actually generate genuine official duties. His account is seriously incomplete.

D

There are further problems. Dworkin has argued that Hart's doctrine of the rule of recognition is not merely incomplete but also it cannot be correct because the analysis of social rules on which it rests fails to capture their normative force.[14]

Recall the distinction between a normative rule or proposition and its corresponding descriptive proposition (which Dworkin labels, respec-

[13] This point is set out most clearly in Hart, *supra* note 1, at 112–13. The rule of recognition, Hart argues, is not a principle "which each judge merely obeys for his own part only" but "must be regarded from the internal point of view as a public, common standard." On this fact rests our ability to speak of the existence and unity of a legal system, says Hart. I take Hart to mean here that the existence and unity of a legal system depend not simply on there being principles actually accepted by officials and others (obeying such principles "for their own part only") but, rather, on there being standards, an essential part of the case for which, in the view of the officials, depends on the fact that others regard the standard as a proper basis for decision—that is, that the standards *be regarded* as essentially public or common.

[14] Dworkin, *supra* note 6, at 48–64; see also Raz, Practical Reason and Norms, *supra* note 3, at 56–58.

tively, the "normative rule" and the "social rule"). Dworkin points out that, on Hart's analysis, a necessary condition of the existence of a normative rule is a regular pattern of behavior on the part of the norm subjects (and others perhaps), which, as it were, instantiates the normative rule.[15] This, says Dworkin, commits Hart to the view that where the regularity runs out, there we reach the outward boundary of the normative rule. That is, the scope of the descriptive rule defines precisely the scope of the normative rule. This leaves no room for controversy. However, social rules *can* be controversial; controversy can arise because different participants construct different formulations of the normative rule which the convergent behavior suggests. And since the dispute between two or more constructions of the normative rule underlying the practice can appeal to no further facts of the practice (since they are already exhausted), the parties to the dispute are forced to appeal to other considerations, in particular, to considerations of critical morality. But cases in which there is controversy are precisely those in which there is no regularity of behavior. So Hart is committed to the view, argues Dworkin, that in such cases it is not uncertain whether the rule extends to the novel case, but it is certain that it does not. Therefore, since Hart's analysis of social rules fails to allow for controversy and the strategies of argument used to defend conflicting constructions of the practice, it fails to account for the normative character of the social rules. According to Dworkin, facts of a practice generate genuine obligations because the justification of the rules which those facts embody rests on background principles of critical morality.

This is a powerful argument,[16] but the problem it raises calls for a revision of Hart's doctrine of social rules and not, as Dworkin insists, the abandonment of the basic Hartian doctrine of the conventional foundations of law. It is to the task of reconstruction of the doctrine of the rule of recognition that I now turn. But this requires a detour away from jurisprudence into the formal theory of social behavior. I return to the legal context in Section 3.

2. Coordination and Conventions

A

Frequently, the consequences of one's actions—and thus one's preferences among alternative actions—depend on what others do. What dis-

[15] Hart, *supra* note 1, at 54, 79–88.

[16] Dworkin's argument seems to rest on an excessively rigid interpretation of Hart's claim that social rules are "constituted by" the social facts of the practice, but it is possible to reformulate the argument in a way that avoids this rigid interpretation and retains its original critical force.

	O'Hare	Midway
WD	5,5	0,0
WN	0,0	5,5

FIG. 1

	C_1	C_2	C_3
R_1	5,5	0,0	0,0
R_2	0,0	5,5	0,0
R_3	0,0	0,0	4,4

FIG. 2

	C_1	C_2
R_1	2,2	0,0
R_2	0,0	1,1

FIG. 3

	C_1	C_2
R_1	2,1	0,0
R_2	0,0	1,2

FIG. 4

tinguishes many forms of social interaction from, say, deciding how to dress for the weather is the *inter*dependence of individual decisions. Social interaction is, in large part, a matter of people responding to an environment consisting of other people responding to their environment, which itself includes responses of the first group.[17] Thus problems of social interaction have the following structural property:

(i) *Strategic Interaction:* The outcomes of the parties are jointly determined by the actions of all; so the outcome of the action of any agent depends on the actions of all the others, and "the best choice for each depends on what he expects the others to do, knowing that each of the others is trying to guess what he is likely to do."[18]

Coordination problems are a special case of problems of strategic interaction. Suppose I am in Washington, D.C., and you are in Chicago. You cable me, "Flying to D.C. for tomorrow's conference: meet me at the airport." Suppose further that we individually discover later that there are two flights from Chicago which arrive in time for the conference: one from Chicago's O'Hare arriving at Washington's Dulles, and one from Chicago's Midway arriving at Washington National. Our situation could be represented by figure 1. We must each decide on a course of action such that we meet at some Washington airport. Which flight you decide to book depends on where you expect me to be, but where I decide to go depends on which flight you book. Neither of us cares *where* we meet; both would rather meet than miss.

[17] Thomas Schelling, Micromotives and Macrobehavior 14 (1978).

[18] Ullmann-Margalit, *supra* note 2, at 78.

From this example we can see that coordination problems are distinguished from other causes of strategic interaction by three further properties:

(ii) *Rough Coincidence of Interests:* Each party is likely to benefit more by cooperation than by noncooperation.
(iii) *Mutually Conditional Preferences:* Certain actions are preferred to others if, but only if, other parties also prefer them (or appropriately corresponding actions).
(iv) *Ambiguity:* There are at least two combinations of the actions of all the agents which each agent would count as "successful" coordination.

Property iii spells out an implication of i and ii: When, but only when, there is *both* coincidence of interest and interdependence of decision, available alternative actions will be preferred by one party if but only if the corresponding actions of the other parties are chosen and vice versa. They are preferred, of course, because they represent successful coordination of the activities of the parties. (I prefer to go to Washington National only if you will arrive there, and you prefer to arrive there only if I am going to be there to meet you.) Thus properties ii and iii make the problem of strategic interaction a problem of *coordination*. Property iv makes it a *problem* of coordination, for in a genuine coordination problem there are at least two "coordination-equilibria," that is, combinations of all the actions such that once it is achieved no agent wishes that any one agent (himself or another) had unilaterally acted differently.

Solutions to coordination problems are based on each party's exploiting mutually concordant expectations. These mutual expectations are brought about by shared or overlapping experiences and by putting oneself in the other's shoes. Since what *I* do depends on what *you* will do, in the ideal case I attempt to replicate your practical reasoning to determine what you will do. And since I know that what you want to do depends on what I do, I must, in replicating your reasoning, determine what you expect *me* to do. And since you are engaged in the same process with regard to me, to replicate your reasoning I must replicate your attempt to replicate mine, and so forth. Given this framework for the nesting of expectations, all that is needed to break the deadlock of a coordination problem is some fact about one of the equilibria which isolates it from the others and which is obvious to both of us and known by us both to be obvious to the other. Thus successful coordination requires the parties to locate some *salient* fact about one of the equilibria that makes it stand out, that is, to read the same message in the common situation, and with that message converge on a solution. (Of course, there may be no salient coordination-equilibrium [c-equilibrium] and so no solution to the coordination problem.)

The airport example represents the purest and simplest of coordination problems. It is worth noting some deviations from this pure case which are nevertheless consistent with the framework defined above. (i) The optimal solution, judged from either the individual or the collective point of view, is not always salient. In figure 2, R_3C_3, the collectively suboptimal c-equilibrium, stands out precisely because it is suboptimal, and in the absence of other factors this may well make it salient. Whereas in figure 3, some factor external to the matrix may make R_2C_2 stand out so forcefully that it becomes salient even though R_1C_1 is preferred by each party. Thus parties need not be indifferent among available c-equilibria. Nor need they agree on their ranking of c-equilibria. In figure 4 the parties are faced with a proper coordination problem even though R would prefer R_1C_1 to R_2C_2 and C would prefer the opposite. For the parties to face a coordination problem, then, it is not necessary for there to be perfect coincidence of interests (absence of conflict), but merely that each party prefer cooperation over failure of cooperation. Thus, though coordination solutions must be *mutually* beneficial, they need not be *equally* so.

Similarly, the extent to which a situation calling for decisions by two or more parties is a situation of strategic interaction may also be a matter of degree. The airport rendezvous example lies at one end of a spectrum, at the other extreme of which lie cases of strictly "principled" decision, in which persons make their decisions on the basis of principles which depend on the actions or decisions of others neither for their application nor for their justification.[19] Between these two extremes are "impure" cases which combine in various ways coordination and noncoordination elements. Rather than limit our attention to pure types, it may be useful to distinguish two broad ranges of decision situations: those in which strategic interaction (and so coordination) elements dominate, and those in which they do not.

Thus, as we move away from the case of pure coordination—either in terms of the property of strategic interaction or the property of coincidence of interest—the property of mutually conditional preferences must be suitably weakened. For example, if there are some considerations that incline one toward an alternative, regardless of how other parties decide, it would be false to say that alternatives are preferred if but only if preferred by all the other parties. Nevertheless, the framework for defining and solving coordination problems is useful even in this case, if the interdependence of decisions is a practically important factor in the situation.[20]

[19] It should not be assumed, and it may be a mistake to believe, that moral decisions must always be located exclusively at the end opposite that of pure coordination.

[20] Seeking coordination itself may be regarded as valuable, perhaps because it is important to the community that what is sought by members of the community be *publicly re-*

B

Often groups of individuals are faced with recurring coordination problems or with the need to coordinate complex activities of a continuous nature requiring many interrelated decisions over a significant period of time. In response to these needs certain regularities in behavior of members of the group (i.e., conventions) may arise, either spontaneously or through the "legislative" activity of some external agent. *Conventions* are regularities of behavior in a community in recurring situations calling for coordinated activity, where the need for coordination and the fact of general conformity are common knowledge. More precisely:

A regularity R in the behavior of persons in a population P in a recurring situation S is a *convention* if and only if in any instance of S

(1) it is common knowledge in P that
   (*a*) there is in P general conformity to R;
   (*b*) most members of P expect most other members of P to conform to R;
   (*c*) almost every member of P prefers that any individual conform rather than not conform to some regularity of behavior in S, given general conformity to that regularity;
   (*d*) almost every member of P prefers general conformity to some regularity rather than general non-conformity (i.e., general conformity to no regularity);
(2) part of the reason why most members of P conform to R in S is that 1*a*–1*d* obtain.[21]

Since a full defense of this analysis of conventions will take us too far afield, I will restrict my comments to noting several important implications of this account.

First, conventions are not mere regularities of behavior but, rather, regularities arising out of and reinforcing a system of mutual expectations *and* a commonly recognized need for coordinated activity. Thus predictions of the behavior of others may be involved, but they are not based on inductive inferences from observed regularities but on nested expectations and replications of patterns of practical reasoning. Moreover, con-

garded as a constituent of the common good. Also, there is something to be said for the view that the Kantian injunction to respect others as persons involves not only *treating* others, as objects of moral concern, in ways which express recognition and respect of their autonomy, and so on, but also involves regarding others as (at least potential) cooperators in the joint enterprise of moral action. See Donald Regan, Utilitarianism and Co-operation 207-11 (1980). But, of course, these reasons for seeking coordination may be outweighed by other considerations.

[21] This account borrows elements from David K. Lewis, *supra* note 2, at 42, 78; and from David Gauthier, David Hume, Contractarian, 88 Phil. Rev. 3, 6–8 (1979). It departs, however, from each of these accounts at certain points, but I will not take the time here to defend each departure. On the distinction between "partial" and "complete" reasons, see Raz, Practical Reasons and Norms, *supra* note 3, at 22–25.

ventions must be distinguished from mere *convergence* of behavior in which the actions of members of a community tend to converge into a recognizable pattern either out of individual habit or because each happens to hold and act on similar practical principles. (Mere convergence entails the absence of strategic interaction.)

Second, this does not rule out the possibility that a participant in some convention may have convention-independent reasons for acting in accord with the conventional regularity. There are three ways in which considerations, more or less independent of the convention, may figure in an agent's practical reasoning, alongside or in conjunction with, reasoning from the facts of the practice. (i) In some cases, it may be precisely the (manifest) moral appeal of one of the equilibria or courses of action which makes the choice of that action salient. (ii) It may be *part of* the convention that in certain circumstances an agent may appeal to considerations which are not explicitly conventional. For example, suppose the convention in a jurisdiction is to follow rules set down in duly legislated codes, and the Commercial Code directs judges to refuse to enforce "unconscionable contracts," where this is well understood to amount to an invitation to the judge to use independent moral standards to determine whether any particular contract is unconscionable. Thus it may be necessary for a judge to appeal directly to independent moral principles, of fairness or decency, to establish unconscionability. But the unfairness of a contract is not a *complete* reason for the judge's refusing to enforce it. An important *part* of the reason for refusing is provided by the convention which permits or requires the judge to appeal directly to independent moral principles. (iii) One might believe that actions required by the convention are also justifiable on other grounds (i.e., with respect to strategic interaction the situation may be to some degree "impure"). There may well be more than one complete and self-contained reason or argument supporting the same action or choice. The action may be both conventional and obligatory as judged on nonconventional moral principles. But does not condition 1*d* of the definition above rule out this possibility? It does so only if one understands the "preference" referred to there as a conclusive or all-things-considered preference. But that would restrict proper conventions to situations of pure strategic interaction. On this strong interpretation of 1*d* there could be significant conventions only in contexts in which the choice among alternatives is entirely morally indifferent, and there is no reason to restrict the account of conventions this severely. We lose nothing in rigor and gain a great deal in explanatory power if we allow a weaker interpretation of 1*d*. I shall understand 1*d* to allow for the possibility that the arguments supporting conformity to a convention, though giving significant (nonnegligible) reasons, may be

overridden by stronger arguments or reasons in some cases. To preserve the integrity of the definition of convention we need only agree that coordination (general conformity) is significantly valuable to the parties and *were* general conformity not to obtain, that fact would provide a significant reason against performing the action in question, a reason which may be sufficient to defeat other independent reasons in favor of performing the action.

Third, conventions may be codified (i.e., given a canonical formulation), and codification may actually make coordination more efficient, but explicit formulation is not necessary.[22] There may even be substantial differences of opinion in the community regarding what the convention requires in some specific instances. To achieve coordination there need only be a wide area of overlap in the descriptions of the regularity (and no significant intersecting of mutual expectations), so that the standard situations needing coordination are provided for. But if there is a possibility of several different understandings of the regularity, might they not conflict? Yes, but this is no cause to worry. It simply poses a coordination problem within a (partially solved) coordination problem. The question in such a case will be, Which of the differing descriptions best covers the bulk of the regularity in past cases and in addition coordinates activity in the present (and similar) cases? This can be solved in essentially the same way as any other coordination problem is solved, namely, by exploiting the mutual expectations that already obtain in the situation.

Fourth, the continued existence of the convention and the reasons for action which it supplies are independent of the origin of the regularity and the moral character of the action involved. It may have arisen out of agreement or contract, but it could as well have arisen by chance. It need not be just, reasonable, or otherwise morally admirable independent of the context of coordination. What accounts for its continued existence and binding character is merely its present success in solving the recurring or persisting problem of coordination. If, as a result of change of circumstances or of widely held preferences, or disruption of the fabric of shared experience on which the convention rests, it no longer succeeds in the large majority of cases, it may fall into disuse or be viewed as a useless formality.

These last two points give some insight into the dynamic character of conventions. We have an account of how conventional regularities might change as the nature of the coordination problem or other relevant circumstances change. Also, in the case of failure of a convention to yield a

[22] See David K. Lewis, Language and Languages, in Language, Mind, and Knowledge 23–24 (Keith Gunderson ed. 1975).

solution in a novel situation, we can account for the possibility of an eventual breakdown of a convention as well as the possibility of a radical shift in focus of the convention. Thus the regularity of behavior that constitutes a convention can be fluid and changing, and the force or binding character of the convention and its persistence through time rest not on the mere fact of a regularity but on the fact that the regularity is embedded in, and provides a continuing successful solution to, a persisting problem (or complex set of problems) of social interaction.

C

I have spoken of the binding character of normative force of conventions. Warrant is needed for this manner of speaking.

First, we can note that conventions represent solutions to persistent, recurring, or complexly interrelated coordination problems. But solutions to such problems focus mutual expectations on a single joint pattern of activity among those defined by mutually conditioned preferences. Thus parties to a coordination situation always have some reason to do their part in the pattern. Of course, the strength of the reason will depend on the "purity" of the coordination situation, the importance of the interests at stake in coordinating, and the degree of confidence a party has that the other parties will do their respective parts.

It appears, then, that it is always (prima facie) rational to follow a convention, in the sense that, other things being equal, one ought (has reason) to conform. Conventions, from this perspective, represent instruments for the satisfaction of independently defined preferences of the parties.[23] But, we might ask, does this exhaust the normative force of conventions? Is there any reason to think that it is not only rational to conform but also to some extent prima facie *obligatory* to conform? A full discussion of this question will take us too far afield, but a limited discussion is necessary for my argument in Section 4*E*.

We might recall, to begin, that following a convention is not a matter of blind imitation, simply doing something because "it is done"; nor is it simply a matter of conforming one's behavior to the expectations of others. It is, rather, engaging in a common form of behavior, thereby meeting the expectations of others which, one recognizes (and one recognizes that others recognize), are mutually dependent. The fact is, others

[23] Although these reasons for action depend entirely on the parties' preferences defined independently of the coordination situation, it does not follow that these reasons are entirely self-interested in character. The extent to which such reasons are self-interested depends on the content of the preferences. Coordination problems arise not only for rationally self-interested parties but even for those concerned to advance the common good.

expect one to conform in part because they know that one expects them to conform, and they have relied (or will rely), perhaps to their detriment, on this expectation. And, in the context, such expectations seem entirely reasonable: others have reason to expect one to conform because there is common knowledge of general conformity and of mutual expectations, and the preferences of the parties are mutually conditional in a situation of strategic interaction. However, not all expectations, or all expectations which are reasonable, or even all reasonable expectations on which there is detrimental reliance, generate obligations. Tradition has it that Kant's daily walks through the streets of Königsberg were as regular as clockwork. But the fact that Frau Schmidt put her pie in the oven with the expectation that she would be reminded to remove it by the sight of the philosopher walking past her window would not put Kant under any obligation to walk his accustomed route, even if he knew of Frau Schmidt's plans. Frau Schmidt's expectations were reasonable enough—she had reason to expect Kant to pass by at the appropriate time—but she was not *entitled* to expect him to do so. She had, we might say, reasonable but not fully *legitimate* expectations. But what more is necessary? Expectations arising in the following two sets of circumstances do seem to generate obligations: (i) when detrimental reliance on those expectations is, in a suitably broad sense, "induced" and (ii) when the context in which expectations arise and are sustained is closely analogous to a cooperative enterprise for mutual benefit in which considerations of fair play require conformity.

In the first set of circumstances we encounter a general version of the doctrine of "promissory estoppel." Professor Fuller formulates the principle in the following way: "Where by his actions toward B, A has (whatever his actual intentions may have been) given B reasonably to understand that he (A) will in the future in similar situations act in a similar manner, and B has, in some substantial way, prudently adjusted his affairs to the expectation that A will in the future act in accordance with this expectation, then A is bound to follow the patterns set by his past actions toward B. This creates an obligation by A to B."[24] However, Fuller's principle suffers from vagueness at the crucial point on which we seek clarification: How are we to understand the phrase "A has . . . given B to understand . . ."? *Restatement of Contracts,* section 90, maintains that a "gratuitous" promise which induces detrimental reliance creates an obligation on the part of the promisor. But actions short of a promise can have the same normative effect. Suppose a truck stalls on a two-lane road and the driver gets out and waves traffic around the stalled vehicle. The truck

[24] Lon L. Fuller, Human Interaction and the Law, 14 Am. J. Juris. 1, 16 (1969).

driver has a duty of care owed to the other drivers, since they can legitimately expect traffic to be clear, when he signals "all clear." Normally, in such cases not only is there detrimental reliance on reasonable expectations, but the reliance is the intended result of the driver's signaling, and this is common knowledge to all involved. (It is only if we assume such common knowledge that the truck driver's activities could be understood as signaling for cars to pass.)

However, we can weaken the case even further, for it is not necessary for there to be *actual* intention to induce reliance. It is sufficient that, under the circumstances, one's actions could reasonably be interpreted as intended to induce expectations and reliance on them. Thus the railway company, which had made a practice of maintaining a signal at a crossing, when it failed to do so is liable to the motorist who relied on the absence of the warning, despite the fact that the railroad did not intend the traveler to do so.[25] The same principle was at work in the 1974 *Nuclear Test* cases.[26] The International Court of Justice held that unilateral public declarations by France regarding its policy to discontinue atmospheric testing of nuclear weapons, even though not given in the context of international bilateral negotiations, and without *quid pro quo,* were nevertheless binding on France. It is true that the court insisted that it was necessary that the declarations be made with the intention to be bound by them, but it went on to say that "the intention is to be ascertained by interpretation of the act."[27] In so interpreting the act, the court relied on the legal fiction that the spokesman for state policy intended the natural consequences of his words. But the "natural consequences" in this context are determined by what other parties (states) could reasonably infer from the public statements of policy, given the background of expectations and understandings against which the statements were made.[28] Thus unilateral actions which, against a background of common knowledge of mutual expectations and understandings, can reasonably be interpreted as intended to induce reliance, generate obligations on the part of the agents of those actions to respect the expectations thereby created. The parties relying on these newly created expectations are entitled to expect behavior consistent with the unilateral actions of the other party.

[25] See, for example, Greenfield v. Terminal Ry. Ass'n, 289 Ill. App. 147, 6 N.E. 2d 888 (1937); and generally see Prosser on Torts 339 (3d ed. 1964).

[26] Nuclear Tests (Australia v. France), Judgment of December 20, 1974 [1974] ICJ 253; Nuclear Tests (New Zealand v. France), Judgment of December 20, 1974 [1974] ICJ 457. See Thomas M. Franck, Word Made Law: The Decision of the ICJ in the Nuclear Test Cases, 69 Am. J. Int'l L. 612 (1975).

[27] Nuclear Test cases, *supra* note 26, at 267 & 472.

[28] Franck, *supra* note 26, at 617.

Such cases of "induced reliance" are, it must be admitted, rare (though as we shall see below not impossible) in coordination situations because they seem to be one sided, whereas coordination situations are characterized by reciprocal relations. This common reciprocal character suggests a second possible argument for conventional obligations. It might be argued that conventions and the strategic social context from which they arise often resemble a cooperative enterprise for mutual benefit. Conventions that arise over time as solutions to persistent or complex, interrelated coordination problems define a pattern of joint activity for mutual benefit in which the success of the enterprise (i.e., the coordination of the actions of the participants) depends on each of the parties doing their fair share. Now regarding single, discrete cases of coordination, or nearly "pure" coordination situations, it may be difficult to interpret them as cooperative enterprises for the purpose of attracting the doctrine of fair play. This is because it is difficult to give content to the idea, essential to the fair-play argument,[29] that parties must in some sense have voluntarily accepted benefits; it is also difficult in these cases to understand the motivation to free ride which the obligation of fair play is designed to counteract. However, in "impure" cases of coordination, and especially in social situations in which there is a rich pattern of interaction and interdependent regularities of behavior developed over time, it is not unlikely that both conditions could be satisfied. In such cases (and assuming that what is at stake in securing coordination is not trivial), failing to do one's part in a conventionally defined joint effort is not only imprudent, it also amounts to failing to carry one's weight in a cooperative effort, that is, it is also unfair. Thus, in some cases at least, parties to a convention not only have some reason to conform, but they may also be under obligation to do so.

3. Coordination and the Law: First-Level Coordination

A

Situations of strategic interaction are pervasive in daily life. These situations call for various forms of collective or cooperative activity or regulation in order to solve the problems they pose. Sometimes we succeed in solving them; sometimes we fail. Often we look to law or basic legal

[29] The "fair-play" argument is developed in H. L. A. Hart's Are There Any Natural Rights? 64 Phil. Rev. 175 (1955), and John Rawls, Legal Obligation and the Duty of Fair Play, in Law and Philosophy: A Symposium 3 (Sidney Hook ed.) (N.Y. Univ. Inst. Phil. 1964). The argument is searchingly criticized by Robert Nozick, Anarchy, State and Utopia 90–95 (1974). A very useful, critical discussion of the debate over the soundness and force of the argument can be found in A. John Simmons, The Principle of Fair Play, 8 Phil. & Pub. Affairs 307 (1979).

institutions to help solve such problems or to support, underwrite, or increase the efficiency of solutions achieved informally. However, law and the processes of adjudication often themselves create problems of strategic interaction. Thus there is some reason to think that the model of coordination of strategic interaction sketched above may illuminate some features of law and the patterns of practical reasoning characteristic of it. I shall consider three points of intersection of law and social life at which significant problems of coordination seem to arise. "Level 1" coordination problems arise independently of law, and the law (in some form) is introduced to help solve the problems. At the second and third levels, coordination problems arise with regard to the adjudicative activities of officials themselves: "Level 2" problems arise between officials and citizens; "level 3" problems arise among law-applying officials themselves. My primary aim is to argue that there are significant second- and third-level coordination problems in a community living under law, that is, to show that it is legitimate to describe social interaction (and the structure of practical reasoning) within the context of law as a set of complex and persisting coordination problems.[30] To clarify this basic thesis, I will explore briefly characteristic contributions of law to first-level coordination problems.

B

I begin with the simplest case—which is also somewhat abstract and idealized—and then fill in more concrete detail as I proceed.[31] Imagine a society in which there are automobiles and roads but no customs or laws regarding driving on the left or right. Two autos approaching each other on a highway face a coordination problem. The drivers may be indifferent between both driving on the left or both on the right, but they prefer either of these to the other alternatives. Suppose, now, that the parties fail to achieve coordination and the resulting accident gives rise to a dispute regarding liability for the damages suffered. Prominent among the questions the court might consider in resolving this dispute would be the question, What could have been expected of the "reasonable man of ordinary prudence"? If the judge were to apply coordination theory to this problem, he could determine a solution by going through the pro-

[30] Coordination problems represent only one form of strategic interaction likely to arise in social contexts. I do not propose here a model for understanding all aspects of law. For a discussion of the variety of forms of strategic interaction which can be found within the legal context, see Schelling, *supra* note 17, ch. 7

[31] At several points in this subsection I am indebted to Conrad D. Johnson, On Deciding and Setting Precedent for the Reasonable Man, 62 Archiv Rechts & Sozialphil. 161 (1976).

cesses of reasoning which the parties should have used in the situation. (Given the solution he could determine which party, if any, failed to do his part—i.e., who failed to do what could be expected of a reasonable person in those circumstances—and assign liability to him.) This case illustrates two important features of the application of coordination theory to judicial decision at level 1.

First, the expectations of the parties vis-à-vis *each other* are decisive here. This may be true even if the shared fact about their situation that enables coordination (produces salience) is some official act: for example, if a similar case were publicly known to have been decided in a certain way. The previous decision *may* be viewed not as announcing the judge's intention to decide similar cases in the same way in the future but simply as a clear, public factor enabling the parties to resolve similar coordination problems. The previous decision has the same status as an earlier successful case (or even fictional case) of coordination known to both parties.[32]

Second, this is somewhat atypical use of coordination theory, because the solution to the coordination problem is sought not by the parties—who evidently failed to achieve coordination—but by an uninvolved third party. Coordination theory suggests how a judge might determine who (if anyone) is responsible for the failure. The judge attempts to discover what the salient solution *would have been*—that is, how, given the expectations of the parties, their problem could have been solved. However, while atypical, this case is interesting in that the imposition of liability under these circumstances, even in the absence of preexisting rules of the road, cannot be faulted by being "retroactive." Thus coordination theory gives us a model for bona fide *adjudication* (as opposed to ad hoc or legislative resolution) of disputes by determining the locus of legitimate expectations, even when the judge is faced with a novel case. The judge on this occasion neither makes up a rule to justify his decision in the instant case, nor *need* his decision be taken as legislating a rule for future cases. Coordination theory provides a framework within which it is possible to move *from* the definition of a problem *through* a nesting of expectations *to* a fair resolution of a dispute without recourse to the notion of preexisting rules. What is more, judicial decision in the novel case, understood in this way, is not essentially different from decision in regulated or easy cases where preexisting rules focus expectations. That is, the structure of the context of practical reasoning, and the kinds of considerations that must be reckoned with, are essentially the same in the rule-governed

[32] Conrad Johnson calls this the "non-legislative precedential effect" of the decision, *id.* at 165.

legal context. But there is one difference: In regulated cases (where there is an applicable rule), the court can reasonably expect parties to have looked to the rule for guidance, since it is likely that the rule will be the salient feature of the practical landscape.

Finally, the judicial decision in this case, though it relies on expectations and the coordination framework, is not forward looking, seeking to decide in such a way to coordinate with future citizen decisions, but, rather, backward looking, attempting to judge who, under the circumstances, had the best grounded expectations regarding the behavior of the other party (who failed to act as "a reasonable man of ordinary prudence").

C

Of course, law and adjudication influence social interaction between private parties in a more positive and forward-looking way than this simple case suggests. Conspicuously missing from this case are general rules and judicial decisions with the intended effect of general rules. Statutes, regulations, and judicial precedents are often most valuable because they provide, and are in part intended to provide, a focus for the expectations of the parties engaged in complex patterns of social interaction. It is tempting to claim that the *basic function* of law is to facilitate and underwrite first-level coordination.[33] However, one may resist this temptation and still admit that law frequently *does* perform this function and that the ability to perform this function well is an especially prized virtue of law. It is worth our noting briefly some of the more apparent examples of the law's facilitating function.

Again take a simple case: A law created for one purpose, and concerned only with one specific sort of action or activity, may provide precisely the point of common knowledge needed to focus expectations of two parties seeking coordination of activity neither explicitly nor intentionally covered by the rule. An important special case of this phenomenon is that of parties drawing solutions to problems in one area of law by analogy from established rules or solutions in other areas.

In these cases it is not essential that the laws providing the focus for coordination be *created for* that purpose. But, of course, we might do so. Suppose, for example, that a municipal council introduces traffic signals and road signs at important intersections and along major routes. Such signals, and the rules associated with them, may considerably facilitate coordination on the roads. If there had already existed certain conventions regarding driving etiquette, the council might have introduced these

[33] See Fuller, *supra* note 24, at 1–36.

rules to clarify or improve the existing conventions, thereby making more efficient the coordination achieved to some extent already by the conventions informally arrived at. But there might have been no prior conventions; the council might have introduced the rules and signs to solve a coordination problem which, because of its complexity, proved too difficult to solve informally. Even in situations in which all parties seek coordination, they may be unable to achieve it without assistance from outside. In such situations, legislated solutions may be very effective in achieving and facilitating continuing coordination.

Normally, of course, the law does not merely introduce a rule. In addition, it will often create machinery to enforce it. In that sort of case, the laws are created not merely to *help* coordination (the parties being left free to achieve coordination in some other way if they wish to). The laws are created, rather, to provide an authoritative solution such that failure to act in accordance with the law creates a strong presumption that sanctions ought to be applied against the party that fails to comply. It must be emphasized, however, that this new feature does not change the fact that these rules may be designed to facilitate coordination. The sanctions do not create, or constitute, the normative force of the rules (which operate as conventions), nor need they supply the primary motivation for compliance with the rules. Sanctions here have the function of *underwriting* the conventions and can be useful for at least three related reasons.[34] (i) They make coordination easier and more efficient because it is no longer necessary to go through the process of mutual replications of patterns of practical reasoning each time coordination is called for. (ii) They reduce the risk that in any particular instance in a recurring situation requiring coordination, some party may fail to exhibit the requisite presence of mild or motivation to achieve proper coordination. (iii) They make it possible immediately to introduce newcomers to the community governed by the conventions; compliance can be counted on, if not because the newcomer shares the appropriate desire for coordination, at least because he will probably wish to avoid the sanction.

4. Coordination and the Law: Second- and Third-Level Coordination

A

With the introduction into social life of public rules, precedents, and officials who identify, interpret, and apply them, a new context of (or

[34] See Ullmann-Margalit, *supra* note 2, at 85–86.

occasion for) strategic interaction is created. A naive realist jurisprudence (following Jerome Frank) views judicial decision making as simply a kind of natural event, to be predicted (where possible) like changes in London weather. The citizen adopting this view regards choosing a course of action falling within the purview of the law as essentially a "game against nature." An equally naive positivism regards lawmaking and law applying by officials as a matter of eliciting a trained response of habitual obedience in those subject to the law. (The teamster's commands "gee" and "haw" [for "turn right" and "turn left"] and the dog's master's command "heel" model this view.) Hart rightly rejects these as hopelessly crude accounts of legal phenomena, precisely because they ignore the essential fact that the parties, whose behavior one may wish to predict or manipulate, can and often do take an "internal attitude" toward the rules of law. This is an important corrective, but it does not go far enough. It fails to acknowledge the fact that decisions of the citizen and the judge are, in a broad and general way, *interdependent*; that the predictions involved are not those based on observed regularities of behavior ("habits") but, rather, those based on nested expectations and interlocking patterns of practical reasoning which are characteristic of strategic interaction. Furthermore, this is not merely a frequent feature of law in action; it is, like the possibility of Hart's "internal attitudes," essential for the existence of law. Let me show why this is true. I shall argue that the law-identifying, law-applying, and law-interpreting activities of both officials and lay persons essentially involve a complex form of social interaction having the structure of a coordination problem—or, rather, of an interrelated, continuous series or overlapping network of coordination problems. To do this I must show that social interaction between officials and citizens, and among officials, has all the properties necessary for a coordination problem. This I shall do in Sections 4*B* and 4*C*. In Section 4*D* I will introduce some important qualifications and clarifications of the main thesis. In Section 4*E* I consider whether conventions in this context give rise to genuine obligations.

B

To begin: It is a defining feature of law that it channels social behavior not by altering the social or natural environment of action or by manipulating the (nonrational) psychological determinants of actions; rather, it relies on rules which guide actions and structure social interaction, thereby providing rational agents with reasons by which they can direct their own behavior. Hart's basic thesis captures well my point here: A

legal system can be said to exist only if it is possible for (at least some of) those subject to its laws to view them from the internal point of view.[35] That is, it must be possible for laws to function as internal guides to action, and as such to figure importantly, as rules or norms, in characteristic patterns of practical reasoning. Thus the law directs action to its ends (whatever they may be) *in its characteristic fashion* only insofar as its standards find a place in the patterns of practical reasoning of those subject to them. Thus the practical import of rules of law cannot be determined independently of considering the role those rules play in the practical reasoning of their subjects.

It is equally important to note that law is a *public* standard. Law is always the law of a group or community.[36] Law exists only insofar as it is realized in the actions, beliefs, and attitudes of members of the community. Unlike so-called private rules of morality or personal policy, rules of law are common, public rules—shared, not in the sense that principled behavior of members of the group tends to converge around recognizable patterns, but in the deeper sense that what they take the rule to be is a matter of mutual understanding, and this mutual understanding is part of the reason for following the rule.

One further point needs emphasis. Rules are capable of guiding action only if they can direct the agent's attention toward some forms of action and away from others. This presupposes that doing one sort of thing counts as acting in accord with the rule and another sort of thing counts as conflicting with it. But the rule itself does not determine this; because, for any rule—say, "pass on the right, overtake on the left"—there are indefinitely many interpretations of this rule to show that what we do accords with the rule and indefinitely many which show that what we do conflicts with it.[37] We can, and do, escape this "anarchy of interpretation" but only because our use of rules *presupposes* a context of interpretation and application which is already fixed (to some degree), against the background of which some things count as acting in accord with, and some things as acting contrary to, the rule. But, given the necessary social or public character of legal rules, this context of interpretation and appli-

[35] It is not necessary, however, that everyone in a community subject to its laws be capable of viewing these laws from the internal point of view. Given the injustice of these laws, or the disadvantaged position of some law-subjects under them, these subjects may have no reason voluntarily to comply with the laws and so no reason to regard the laws from the internal point of view. See Hart, *supra* note 1, at 197.

[36] A. M. Honoré, Groups, Laws, and Obedience, in Oxford Essays in Jurisprudence 2 (A. W. B. Simpson ed. 1973).

[37] Ludwig Wittgenstein, Philosophical Investigations 1, 143–201 (G. E. M. Anscombe trans. 1953); also Robert J. Fogelin, Wittgenstein 142–47 (1976).

cation must be a public, shared social practice. This, however, does not mean that it is not possible to introduce a new rule into a community (since for a rule to exist there must already exist a practice of applying *it*): All that is necessary is that there be a practice of interpretation and understanding of rules in the community into which the new rule can be introduced and in light of which the rule will be understood and followed. Nor does this mean that indeterminacies in the practical import of a rule never arise, for it is only against the background of what could count as actions in accord with the rule that indeterminacies could arise.

Thus the structure of practical reasoning on which the practical import of rules of law depend cannot be a matter of private insight but must be part of a shared, public practice of rule understanding and rule following. This, of course, is true of all sorts of public rules. But law introduces a further, complicating, element. Officials of primary institutions characteristic of legal systems are charged with the task of authoritatively identifying, interpreting, and applying the public rules of law. Judges must mediate between the law—that is, the statutes, patterns of judicial precedent and official actions, and other relevant institutional facts and the principles embedded in them—and the behavior of those subject to the law. However, the authoritative law-identifying, -applying, and -interpreting activities of judges *themselves* tend to shape in a special way the practical import of the laws precisely because of the authoritative position occupied by them.

From these reflections it should be clear that all the elements of strategic interaction obtain in the relations between law-subjects and judges. First, what law-subjects choose to do given the existence of general rules of law depends on how they understand what the law expects of them and how it will direct or impinge on their activities, but this depends on how they expect officials to interpret the relevant laws. Similarly, judges, in order to communicate and articulate the law effectively, must seek to understand and interpret it against the background of the patterns of application and understanding of the law of those subject to the law. That is, the understanding of law by officials and law-subjects is to an important degree interdependent.[38] Law can direct action to its ends only if

[38] Edward White recognizes this essential interdependence in his discussion of the reaction of the "Reasoned Elaborationists" to the excesses of early legal realism. "In emphasizing the disingenuous aspects of the use of precedent, rule, and doctrine, the Realists had made too simplistic an appraisal of the function of the rationalization process in judicial opinions. They had failed to grant due respect to the fact that a judge's use of these devices was itself constrained by the expectations of others. A new set of questions about judicial decision-making emerged, revolving around the reasoning of opinions." G. Edward White,

its rules are integrated into the practical reasoning of those subject to the rules. But this requires communication of the rules, and communication is an interactive process in which the understanding of each party depends on the expectations and understanding of the other. Authoritative interpretation and application of the law can to some extent take the lead—there is, therefore, for this reason a significant asymmetry in the strategic relations between subjects and officials—but it cannot depart substantially from the background practice of interpretation and remain an intelligible enterprise (or at least not one with the distinctive characteristic of law).

Few are likely to deny that the lay person's understanding of the law depends on the actions, decisions, and patterns of practical reasoning of officials, but some may still be tempted to deny that judicial understanding and application of the law is reciprocally dependent on that of law-subjects. But to deny interdependence here entails rejection of either the social thesis or the normativity thesis. To reject the claim of judicial dependence on lay understanding of the law for which I have argued is to assume that it is possible for there to exist a legal system in which the judiciary *systematically* ignores the beliefs, attitudes, expectations, and patterns of practical reasoning regarding the law, and the activities of its officials, of all law-subjects. But consider for a moment this assumption. Presumably, the judiciary must defend its decisions to regard certain rules as valid in the system or to interpret a given rule in a certain way. However, on this assumption, this defense could not depend in any important way on the beliefs, attitudes, or expectations of law-subjects. What, then, could such a defense look like? I can think of only two possibilities.

First, appeal could be made to some allegedly objective standard, knowable, perhaps, through reason or some faculty of intuition but which depends in no way on what anyone believes about the law. Thus the judge might claim that his interpretation is correct, contrary to the beliefs of everyone else in the community (lay persons and officials alike), because it properly corresponds to this objective standard. He admits, of course, that he too could be wrong, but that just means that there is an interpretation which no one has yet discovered which is the truly correct interpretation of the law.

This view, however, rests on the absurd conviction that there is a legal

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The Evolution of Reasoned Elaboration: Judicial Criticism and Social Change 59 Va. L. Rev. 279 at 285 (1973). Larry Alexander also notes the importance of interdependence in his discussion of the impact of the canons of interpretation on constitutional interpretation. Larry Alexander, Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique 42 Ohio State L.J. 1 at 10 (1981).

reality existing external to and independent of the beliefs, attitudes, forms of reasoning, and practices of any group or community, and that the truth conditions of propositions of law in the community's legal system are facts about this external legal reality. This kind of legal realism (or Platonism) amounts to a complete denial of the social thesis. On this view law is not a matter of common public rules which structure the behavior and interaction of members of the community; it is, rather, a mysterious, abstract reality—a "brooding omnipresence in the sky"—against which the actions of individuals are measured. Such a realist conception of practical norms *may* be intelligible as an account of morality (though I have grave doubts even there), but it is simply not intelligible as a conception of law. Legal Platonism fails because, although law is surely a matter of objective fact, it is a matter of objective fact *about* the beliefs, attitudes, forms of thought, and characteristic patterns of reasoning of participants in the enterprise, and not about some external reality defined independently of these.

Second, there is an alternative basis for the judge's decision which does attempt to make some room for the social thesis. The judge could endeavor to take into consideration only the beliefs, attitudes, and expectations of those in the official elite: Law is what officials—as a group—say it is. But to believe that this attitude could be, not just exceptional or parasitic, but systematic and dominant in the judiciary is to reject the normativity thesis. For if law is still regarded as a means of influencing or directing social behavior, but those who identify, interpret, and apply the laws systematically ignore how those rules figure in the practical reasoning of law-subjects, they must regard the laws and their decisions as devices for tripping trained responses, like the teamster's "gee" and "haw." But that is to eclipse completely the normativity thesis. It is not impossible for there to exist persons in positions of power over other human beings who seek to manipulate behavior in this way, but it would be impossible to regard the enterprise as a regime of law.

Hart's example of an official scorer in a game may help us understand why this is so. The scorer's decision may be final and unappealable. The scorer may make mistakes, and there may be instances in which the scoring rules are indeterminate, but in each case the scorer's decision wins the day. Nevertheless, his activity can be intelligible to the players (under the concept "making scoring decisions in such-and-such a game") *only if* his decisions coordinate significantly with the shared understanding of the rules of the game among players and scorers alike. It must be possible for any person (player or fan) to engage in the same activity on an unofficial basis as the scorer does on an official and authoritative basis. As J. R. Lucas has pointed out,

[The] position of the unofficial scorer is stronger than Hart allows. It is not merely that he is doing in an unofficial and non-authoritative way the same as what the official scorer does, but that it is an essential condition of the intelligibility of the official scorer's activity that he is doing, only in an official and authoritative way, the same as the unofficials are doing, and what they are doing is something which, although for convenience sake made the responsibility of an official scorer, can essentially be done by unofficials at large.[39]

If this is impossible—if the official ignores the tradition of interpreting and understanding the rules—not only is the game changed, but it becomes impossible for players and fans to take an internal point of view regarding this new "game."

But the point must be put more strongly: Not only are the official and unofficial person engaged in some parallel activity, but the activity of the official *depends crucially* on the activity of the unofficial and that of the unofficial on the official. And this *explains why* the possibility of the unofficial doing what the official does is an essential condition of the intelligibility of the official's activity.

Thus, in the interdependence of the law-identifying and law-applying activities of officials and citizens, we find a complex form of strategic interaction. But interdependence is only a necessary condition of a coordination situation; it is not sufficient. To show that this situation of strategic interaction is in fact a coordination situation, one must show further that the underlying structure of the preferences of the parties in this decision situation is the structure characteristic of coordination problems. This is not difficult to do for the bulk of cases. It is not difficult to see that, in the context in question, whatever their further or ultimate motives are, both officials and citizens will generally wish to converge on interpretations rather than diverge. That is, possible alternative understandings of the relevant law material are preferred if, but only if, they are also preferred by the other party (mutually conditional preferences). In standard cases there is little motivation on the part of either party to "outsmart" the other party. The citizen, for his part, seeks coordination of interpretation because he wishes to live within the law, to seek the common good, to achieve his own ends with the assistance of the facilities provided by the law, or to avoid the sanctions threatened by the law. The judge, for his part, seeks coordination because he is charged with the task of making law effective. Thus the "preferences" of the citizen may be personal or communal. In contrast, the "preferences" of the judge are not personal but professional, defined by his task as a mediator between the law and the behavior it governs. Finally, it should be obvious that the

[39] J. R. Lucas, The Phenomenon of Law, in Law, Morality, and Society 94 (P. M. S. Hacker & J. Raz eds. 1977).

condition of ambiguity is easily satisfied in this context. There will often, if not always, be more than one possible interpretation of a general proposition of law on which the parties could coordinate their expectations. Thus we can conclude that in important respects the relations between law-applying officials and ordinary citizens living within a system of public rules of law meet all the conditions which define coordination problems.

C

This explains, then, what I have in mind when I speak of "level 2 coordination problems" within a legal system. It is now quite easy to establish that there is also a third level of coordination within the law. Because I have argued this claim elsewhere, I can be brief here.[40]

Thus far I have spoken of judges (or law-applying officials) as if there were a single entity or party. But, of course, there are likely to be many judges in a jurisdiction making decisions at many different levels. But citizens react to, and attempt to anticipate or predict, the law-applying activities of the judiciary as a whole. Thus, if the activity of law applying is to achieve the ends of the law in a reasonably efficient manner, it must be possible to view the activity of law applying as governed by some reasonably coherent pattern. This requires that judges seek to coordinate *their* law-applying activities in order to achieve something tolerably close to a norm of what I have called "institutional coherence."[41] It is not only expectations of parties regarding *his particular* actions or decisions that a judge must consider. He must also consider how he expects other colleagues on the bench will identify and apply the law, and their expectations of his decisions. This creates a *third-level* coordination situation.

D

The thesis for which I have been arguing in this section stands in need of some clarification. First, I do not claim that interactional or coordination considerations figure explicitly in every judicial decision. The interactional elements are deep and pervasive; often there is no need to make them explicit. My thesis is not advanced as a claim about what is always present to mind in citizens and officials when deciding how to act under a system of law. Rather, it advances a claim about the structure or

[40] See Gerald J. Postema, Bentham and Dworkin on Positivism and Adjudication, 5 Soc. Theory & Prac. 347, 369–73 (1980).

[41] *Id.*

logic of the practical reasoning implicit in their decision making and in the idea that law is characteristically a matter of public rules.

Nor, second, do I wish to claim that every judicial decision presupposes (though it may not explicitly display) these coordination elements. It is not an implication of my thesis that a judge who simply ignores such considerations in a particular case thereby disqualifies his decision as a "legal" decision or disqualifies himself as a judge (or must be said to have acted in his private capacity). It is surely possible for a judge to do so, and he may have compelling reasons for doing so. To say that the decision was not a "legal" decision (perhaps just a "moral" or "political" or "personal" decision) suggests that our criteria for what counts as a legal decision are sharper than they in fact are. The thesis I have defended maintains only that coordination is fundamental to law and that no legal *system* is conceivable without substantial coordination elements at its foundations.

Third, we have noted a significant asymmetry in the interactional situation between citizens and officials. Obviously, the law-identifying and law-applying activities of judges have greater significance for judges and citizens alike than do unofficial activities of the same sort. However, this asymmetry does not undermine the claim of genuine interdependence. For example, one-sided signaling systems surely represent conventional solutions to coordination problems. (Suppose helpers never became truck drivers but had to devise a system of signals which could successfully guide drivers into narrow docking spots.) A similar asymmetry exists in the relations between officials in a game and players and fans. Consider also a group of contented oligopolists, unable because of the law to form a cartel, who wish to maintain a uniform but properly fluctuating price for their products and thereby avoid a price war.[42] A special convention may arise to regard one of the group as a price leader. The rest of the group will pay special attention to the price leader's setting of prices, but the price leader must take care that he sets the price in a range satisfactory to all or he risks plunging them all into a price war. Thus, as these examples show, asymmetry in the interactional situation does not undermine interdependence.

E

I have argued that social interaction within the context of a legal system has all the properties of a complex coordination situation. Within this situation, regularities in the practice of identifying, interpreting, and ap-

[42] Both this example and the truck driver/helper example were suggested by Lewis, *supra* note 2, at 46.

plying rules of law amount to conventions around which mutually interdependent expectations are focused. From this it follows that each of the parties to this complex pattern of interactions has reason to conform to conventions, and to seek coordination solutions, where they exist. But, we might ask, do such conventions regarding identification or interpretation of the law impose *obligations* on the parties? We must rely here on our previous discussion in Section 2C, but we must discuss the situations of citizens and officials separately.

To begin: Are law-subjects obligated to conform? Two preliminary points must be noted before we can answer this question. First, only as long as the situation of strategic interaction between law-subjects and officials meets the conditions of a coordination problem do the law-subjects (or for that matter, the law-applying officials) have reason to conform, simply in virtue of the existence of the conventions (i.e., without regard to their content or origins). This is because there is reason to conform only if parties regard achievement of coordination as desirable to some extent (though not necessarily overridingly so). Thus law-subjects who will be no better off having successfully coordinated their activity under the law than if they had failed, will have no reason to conform.

Second, it must be noted that having reason to conform to conventions regarding the identification and interpretation of the law does not entail that one has reason to comply with the law thus identified and interpreted. Holmes's bad man seeks to coordinate his decisions with those of officials, not in order to determine what the law expects of him but, rather, to determine how best to escape its demands. Reasons for the citizen to comply with conventions to solve second-level coordination problems generate or support reasons to comply with the law only if the laws are reasonably effective in coordinating social interaction at the first level, or if they can be supported as just, fair, or reasonable on some other grounds.

While granting these points, we might be tempted to argue that citizens have an obligation to conform because the conventions in question define a kind of cooperative enterprise for mutual benefit, which attracts the doctrine of fair play. But this argument fails. For, however this interpretation of the coordination situation between officials and citizens fares in other respects, it is bound to fail to meet one important condition of the fair-play argument. For that argument to establish an obligation on beneficiaries of the efforts of others in a cooperative enterprise, it is necessary not only that the party have received benefits but also that the party have in some significant sense *voluntarily accepted* them.[43] Critics of the use of the fair-play argument to ground the obligation to obey the

[43] See Simmons, *supra* note 29, at 319–33.

law have correctly pointed out that the benefits of legal and political institutions, and of general conformity with the demands of law by one's fellow citizens, are seldom accepted voluntarily. Such benefits are public goods which one receives largely whether one accepts them or not; one has little or no choice in the matter.[44] But if this is true of laws identified and interpreted, it is no less true of conventions for the identification and interpretation of laws. If citizens fail to comply with existing conventions, they misidentify or misinterpret rules of law. That would seem to be their loss—it is hard to motivate the charge that they thereby unfairly take advantage of officials who rely on them.

The fair-play argument fails, then, and I know of no other plausible argument to support the view that citizens are obligated to comply with conventions at the foundations of law. Thus law-subjects often (although not necessarily) have reason to comply with such conventions, but they do not ordinarily have any obligation to do so (i.e., apart from the fact that the convention may truly serve some morally desirable goal or principle). But this is not an unwelcome result, for there seems intuitively to be an asymmetry between the situations of the law-subjects and of law-applying officials regarding their respective obligations. Although we are inclined to hold that officials have obligations to respect the expectations of citizens regarding the officials' activities, we are less inclined to hold that citizens owe a similar obligation to officials.

This intuition, I believe, is sound, and the account I have developed of the practical structure of identification and application of law explains why. There are two sources of *judicial* obligations to comply with conventions at the foundations of law. First, the preferences of officials, in virtue of which we are entitled to regard their interaction with citizens as a complex coordination problem, are not personal preferences but are determined by the professional-institutional task set for the judiciary. They are charged with the task (inter alia) of mediating between the law and the behavior it purports to guide. In the interest of effective execution of, and adjudication under, the law the judge ought to seek coordination at both second and third levels and, consequently, ought to comply with those conventions which promise to achieve such coordination. This, we might say, is part of the professional duty of the judge, defined by the function of adjudication in a legal system.

But a deeper source of judicial obligation can be found if we recall that, although the practical situation which obtains between citizens and officials is characterized by mutual dependence, it is nevertheless asymmetrical. The judge must replicate the reasoning he believes citizens will use in determining what he will do, and vice versa; however, the court's

[44] *Id.* at 333–37.

decisions, actions, and interpretations are—in virtue of the role the court is assigned—given special weight. These activities, unlike those of nonofficials, are regarded as authoritative (i.e., binding even if mistaken).[45] This fact, plus the fact that judges in adjudicating exercise power over others, attracts what Dworkin calls "the doctrine of political responsibility."[46] According to this doctrine, "It is unfair for officials to act except on the basis of a general public theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they do, and not allow appeals to unique intuitions that might mask prejudice or self-interest in particular cases."[47] Now this requires two things of a judge's "general public theory." (i) It requires not only that the judge fit his actions and decisions into a coherent program, but also that he attempt to coordinate his theory-constructing and decision-making activities with those of his colleagues in the judiciary so that, as far as he is able to bring it about, the institution of law as a whole achieves some reasonable degree of coherence.[48] (ii) It requires that the judge respect the reasonable and legitimate expectations of citizens regarding these activities which arise out of a strategic situation which is essentially interdependent but which are specially shaped and focused by the authoritative position of the judiciary. This is so because the court regards, and insists that all others regard, its decisions and actions as authoritative, having special weight. It thereby *induces* expectations (and reliance on them) on the part of citizens, and this is not an accidental feature of law-applying institutions but essential to their role in the legal system. But, then, on the basis of the argument advanced in Section 2*C*, it follows that these expectations must be respected. Citizens are *entitled* to expect that officials will seek coordination at the second and third levels. Thus judges, on the doctrine of political responsibility, are obligated to seek coordination at both levels and so to conform to conventions which achieve this coordination. Officials and citizens are in morally asymmetrical positions, in part, because they occupy strategically asymmetrical positions.

5. The Rule of Recognition Reinterpreted

A

Hart holds that the authority of the rule of recognition rests on the facts of judicial practice, that is, on the regularities of judicial behavior in

[45] Raz, Practical Reasons and Norms, *supra* note 3, at 134–35.

[46] However, my reading of this doctrine diverges from Dworkin's; see Postema, *supra* note 40, at 367–71.

[47] Dworkin, *supra* note 6, at 162–63.

[48] See Postema, *supra* note 40, at 370–71.

identifying and applying the law and on the internal attitudes associated with those regularities. We are now in a position to see why such an appeal could constitute a satisfactory argument for a claim of judicial *obligation* to identify and apply law which meets established criteria of validity. The problem Hart's doctrine raises is how to characterize the facts of judicial law-applying practice such that they by themselves give rise to an obligation on the part of any particular judge to conform to the practice. The mere fact of a regularity of behavior is insufficient to generate any warranted claim of obligation. Furthermore, it is not sufficient that the officials in question regard the regularity from the internal point of view, that is, regard the rule as a standard or guide for their action. For the fact that some view a rule as a standard and guide for their action does not, by that fact alone, give others reasons for doing so. Of course, one may go on to demonstrate that the people in question are *correct* in viewing the rule in this way, but the fact that they do is not likely to play any role in the argument. So, not just any internal attitude will do the job.

If, however, the internal attitude in question includes the recognition or common knowledge of nested and mutually conditioned expectations focused by the regularity, and if the situation in which the expectations arise is one of strategic interaction, then a distinctive reason for action, and a form of obligation, does naturally arise. That is, given that the activity of law-identifying has all the characteristics of a complex and continuous coordination problem, and that there are significant professional pressures to seek coordination, the fact that there is a regularity which focuses the expectations of the parties generates a (prima facie) obligation on the part of the judge to follow the practice.

The rule of recognition, then, is best understood as involving a convention, that is, a regularity in the behavior of law-applying officials and citizens in situations calling for the identification of valid legal standards, such that part of the reason why most officials conform to the regularity is that it is common knowledge that most officials and citizens conform to the regularity and that most officials and citizens expect most (other) officials and citizens to conform. It is important to recall that following a convention is not merely a matter of convergence of "principled" official behavior; for the fact of the regularity, and the expectations of others focused by it, figures importantly in each party's reason for conforming. (Judges do not follow the rule of recognition "for their own part only" but regard it as a common public standard of correct judicial decision.)[49] Thus, by understanding the internal attitude involved in conventional

[49] See note 13 *supra*.

rules in this way, we have constructed a bridge linking social facts of judicial practice to bona fide normative considerations, indeed, to a species of genuine official obligation.

On this view, conventional judicial duties are genuine duties, not just forms of behavior which people may *believe* to be obligatory. Because they rest on an important (albeit limited) concern for fairness, they belong to a species of moral duty.[50] (It is not to be inferred that, thereby, these obligations are especially weighty. Nothing in the argument above entails any view regarding the moral weight or limits of conventional judicial obligations. These questions remain to be explored, and answers to them depend on the place that the underlying doctrine of political responsibility is given in a general theory of right and justice in adjudication. The task of this essay is not to sketch such a general theory but to indicate some important constituents of it and to link them to traditional concerns of jurisprudence.)

I must hasten to add that the normative force of the conventional rule of recognition rests neither on the moral merits nor the inherent reasonableness of the rule itself, nor on the judge's (or anyone else's) belief in such. It depends simply on the fact that the rule succeeds in the task of coordinating law-identifying and law-applying activities of officials and lay persons.[51] It provides a common way of acting on a large number of occasions, where often it is more important that there be a common way of acting than that it be *the* right, just, or otherwise best way. Judges need not believe, nor need it be true, that the existing rule of recognition is the ideally best such rule. They may believe, and have good arguments to show, that it is; they may also believe, and have good arguments to show, that some other rule would be better, more just, or the like. But as long as the existing rule succeeds, and alternative rules cannot promise success, *and* as long as achieving coordination is at least minimally desirable, the existing rule will continue to generate (prima facie) obligations on the part of officials to conform to it. This captures Hart's insight that the existence of the rule of recognition (and the judge's obligation to conform to it)

[50] And since such duties arise strictly from certain conditions on the intelligibility of law-applying activities, we *may* wish to say that we have discovered a significant, albeit limited, link between law and morals at the foundations of law.

[51] Perhaps I should say, "The normative force depends on the fact, *when it is a fact,* that it succeeds. . . ." Salience of the conventional regularity is never guaranteed, of course, so situations *may* arise in which other factors focus the expectations of all the parties on some other pattern of actions or sufficiently compete with the conventional regularity to create further ambiguity. These considerations, however, do not threaten my claim regarding the conventional foundations of law. For that claim rests on the view that what is important is not the regularity but the practical, strategic context in which the regularity gains normative significance. See *infra* 201–2.

depends not on the reasons judges and others have for accepting the rule but merely on the *fact* of their acceptance.

Thus, since the justification of judicial obligation under an effective legal system does not rest on the substantive justification of the rules, principles, rights, or duties claimed by the system, we can account for the normative force of judicial obligation without making Dworkin's problematic assumption that the judge has adopted the particular ideology of the legal system within which he works.[52] The normative force (authority) of the law rests on the social function of the law, that is, on its place in the complex activity of social interaction, and not on the content (the truth or approximate correctness as moral standards) of the rules and standards of law.

This does not imply, of course, that convention-independent moral considerations do not, or may not, figure in judicial reasoning. On the contrary, I have shown earlier (Sec. 2*B*) that such moral considerations may play a significant role in convention-structured practical contexts. (The extent to which they do or should may vary from legal system to legal system.) First, in some cases, it may be precisely the moral appeal of one of the courses of action which makes it salient. This might be true in situations where a conventional regularity does not exist and is even possible where such a regularity does exist but is compromised by other factors. Second, and more important, it may be *part of* the convention itself that in certain circumstances (or classes of cases) the judge is authorized to rely heavily on convention-independent moral concerns.

B

We can now answer directly Dworkin's powerful argument from controversy. The main strategy of this reconstruction of Hart's doctrine of the rule of recognition was to develop an analysis of the social context within which the facts of the judicial practice (from which the rule of recognition springs) get their practical significance. I have sought to show how these facts are necessarily embedded in a complex and continuous problem of strategic social interaction. It is in virtue of the mutual interdependence of expectations and preferences of both officials and lay persons that coordination is both necessary and possible. And it is only in virtue of these expectations that the judicial practice of authoritative identification of valid rules of law enjoys the normative and jurisprudential significance it has. It is this framework of strategic interaction, and the nesting of expectations that characterizes it, that lies at the foundation of

[52] Dworkin, *supra* note 6, at 105.

every legal system. We may still wish to identify the rule of recognition with the conventional regularity which, across a wide range of cases, provides the focus for coordination of this activity. But we are not simply left with nothing more to say when that regularity runs out. Thus, given this framework, it is possible to account for uncertainties in the rule, changes in the rule over time, and adaptation to new and changing circumstances (see Sec. 2*B*). Uncertainty about the convention may arise, but a mechanism for its resolution is provided by the framework of practical reasoning and social interaction within which the convention has its existence. The convention is a regularity of behavior in recurring situations calling for coordination. When the convention is uncertain, giving rise to two or more possible interpretations, a new coordination problem may be created. But essentially the same sorts of considerations which determine what should be done where there is a clear convention operate in this case to motivate the search for a new solution. Moreover, the factor which gives rise to the obligation to conform to the convention when it is clear is not (ultimately) the regularity of behavior but the structure of the situation of strategic interaction. That context still exists, and may still generate obligations, where the salience of the conventional regularity is obscured by the circumstances. The task, then, is to search out some other point of salience.

Furthermore, this is not incompatible with the recognition that conflicting interpretations may be defended by appeals to principles and arguments drawn from critical morality. The coordination model of conventions allows for such appeals because it is true that moral considerations may provide just the element of salience necessary for successful coordination. Especially appeals to widely held conceptions of fairness, equity, common good, or reasonableness often will provide the focus for expectations which makes solution of the problem of coordination possible. Thus it may often be important to bring out for public inspection substantive arguments of critical morality and to engage in public debate about such matters. But the present account also recognizes an important constraint on such arguments which Dworkin's nonconventionalist theory ignores. Of course, we have no guarantee that there will always be a solution for every coordination problem. So, when controversy arises with regard to the rule of recognition—that is, to the conditions of validity themselves—there may be no coordinated solution to the controversy. However, if judicial duty is ultimately conventional in the way explained earlier, there will be controversial cases in which, because there is no coordinated solution, there is no judicial *duty* to decide the controverted issue in a particular way. The judge still has a duty to seek a solution according to his best judgment impartially and without prejudice, interest,

or caprice. The good judge will seek a solution in the best arguments he can construct from principles of political morality. But in such cases no unique right answer is likely to emerge. Thus, whether judicial duties exist to resolve controversial issues in a unique, determinate way, where the controversy involves the criteria of validity themselves, is a *contingent* feature of law. There may be a duty in every such controversial case, but we have no guarantee that there will be, nor any reason to believe there must be. But especially in the context of controverted constitutional issues, far from constituting a weakness of the present account, this fact introduces a note of realism into the discussion.

It must be emphasized that the new solution to a coordination problem (e.g., in cases of controversy) is not simply an extension of the rule constituted by the regularities of judicial behavior such that it can be said that the extension was already part of the rule. The central thesis of this essay is that the normative significance of judicial practice can be understood only against the background of the form of strategic interaction characteristic of law at its foundations. The effect of this interpretation of the doctrine of the rule of recognition is to shift the focus of analysis from mere regularities of behavior to the social context and the framework of practical reasoning within which these regularities are normatively significant. The regularities of the practice often provide the focus of attention for both citizens and officials and may attract different interpretations (and corresponding expectations) and so may generate controversy. But because these regularities generate obligations only in virtue of the strategic framework, and the pressures for coordination behind it, the key jurisprudential element here is not the regularities but the background practical framework. Continuity at the foundations of law, then, is provided not by some fixed rule, the extensions of which to novel situations preexist controversies about them, but, rather, by the framework of strategic interaction and the mutually recognized need for coordination.

We might wish to say, then, that viewed simply as a static phenomenon, the rule of recognition (or, more generally, the conventional foundations of law) is constituted by certain behavioral regularities of officials and lay persons. But viewed from a full appreciation of its dynamic reality, this conventional foundation is constituted by the constantly shifting patterns of expectations and need for coordination which define the framework of practical reasoning characteristic of law. Thus Dworkin was correct to point out the inadequacies of the static conception of social rules on which Hart seemed to rely. But these inadequacies do not force us to abandon the positivist conception of the rule of recognition as a matter of convention in favor of a nonpositivist conception grounding law in critical moral-

ity. They merely require that the positivist provide a more adequate account of these conventional foundations which gives full scope to its dynamic properties. It may, then, be misleading to speak simply and without qualification of a behavior-specified social rule at the foundations of law, but it is not mistaken or misleading to speak of the essentially conventional nature of law at its foundations.

C

If the account above is correct, law rests at its foundations on a complex set of conventions regarding proper law-identifying and law-applying activities of both officials and citizens. Thus law is a matter of social fact, importantly related to the activities of certain basic institutions. These social facts are embedded in a complex network of strategic social interaction. Because of this embedding, the social facts yield concrete reasons for action; they generate genuine obligations. Law, then, defines a framework for practical reasoning. With the notion of convention, and the related concepts needed to explicate it, we have bridged the gap between the social and normativity theses. The key to the reconciliation, as Hart saw, was to focus not on the content of the criteria of identification or validity but on the underlying conditions of existence and authority of these criteria. In this way a straightforward account of the reason-giving character of law could be developed without thereby incorporating *into the general theory of law* a normative criterion of identification of laws (as is characteristic, for example, of natural law theories, and seems to be the aim of Dworkin's account). That is, according to this account, the content of criteria of validity in any given jurisdiction is entirely a matter of social fact—of conventional morality, but not of critical morality. Nevertheless, as I have taken pains to point out, the social thesis advanced here is compatible with the claim that in some (perhaps many) instances, the identification of laws in a legal system may depend on moral argument in an important way.