7

The Model of Social Facts

BENJAMIN C. ZIPURSKY

I. INTRODUCTION

Rules are central to *The Concept of Law*[1] in at least two respects—one pertaining to certain propositional or linguistic entities, the other, to certain kinds of practice within a community. While one vital theme of the book is that a legal system is a system of rules, a second, and equally important, theme is that for some norm to be a law is for the officials of the community to have a special kind of rule—a social rule—of treating certain norms as laws only if they comply with certain criteria, and for that norm to comply with those criteria. The notion of a *rule of recognition* fuses these two senses of 'rule', being both a fundamental secondary rule within a legal system and an important social rule within a legal community.

Dworkin's attack on *The Concept of Law* highlights the central role given to rules, particularly in the seminal articles, 'The Model of Rules I' and 'The Model of Rules II'.[2] Each of these articles focuses principally on one of the two rule themes referred to above. 'The Model of Rules I' argues that the model of legal systems as sets of rules is fatally flawed because it ignores the pervasive place of principles in the law. 'The Model of Rules II', by contrast, does not focus on rules and principles in legal systems. It takes aim at Hart's practice account of *social rules*, and at his effort to explain legality as a matter of fact about the conduct and attitudes of legal officials.[3]

I am grateful to Jules Coleman, Jill Fisch, John Goldberg, James Kainen, Charles Kelbley, Arthur Ripstein, Anthony Sebok, and Scott Shapiro for helpful discussions of the ideas put forward in this essay.

[1] H. L. A. Hart, *The Concept of Law* (2nd edn., ed. P. Bulloch and J. Raz, 1994) (hereinafter *CL*).

[2] Ronald Dworkin, 'The Model of Rules I', in *Taking Rights Seriously* (2nd edn., 1978), 14–45 (hereinafter *TRS*); 'The Model of Rules II', in *TRS*, at 46–80. 'The Model of Rules I' will be referred to in text and notes as MOR I and 'The Model of Rules II' will be referred to as MOR II; page references in the notes will be to *TRS*.

[3] Both MOR papers treat both issues; the question is one of focus. See esp. *TRS*, at 48–64 (sections of MOR II, criticizing Hart's theory of social rules). Indeed, MOR I obviously does not rest on a mischaracterization of Hart as believing that legal systems consist only of 'rule-like' norms, as opposed to principles. Nevertheless, it is fair to characterize the gestalt theme of MOR I as built upon Hart's inability to go beyond rules and accommodate principles in law, and the gestalt theme of MOR II as built upon the idea that social rules, in the Hartian sense, cannot be what makes valid law valid.

Hart's Postscript. Jules Coleman.

Hart responds to both of the lines of attack in the Postscript, and in each case defends his position against Dworkin, while conceding some ground. There is, however, a notable difference in the tenor of these two responses. This difference suggests a distinction both in Hart's estimate of the power of Dworkin's respective criticisms and in the comparative centrality of the two centres of *The Concept of Law*. On the topic of rules and principles, Hart openly concedes that it is a defect in the original edition of *The Concept of Law* that it paid insufficient attention to arguments from legal principles in the law.[4] And while he carefully argues that many of Dworkin's contrasts between rules and principles were overdrawn, he implicitly concedes that many legal provisions that would aptly be described as 'principles' are not adequately described as 'rules'.[5] Most importantly, Hart declares unambiguously in the *Postscript* that he accepts the intermediate position of soft positivism.[6] Soft positivism—or, as I will call it, 'inclusive positivism'—is a view advanced by Coleman,[7] Soper,[8] Waluchow,[9] and others, which asserts that in many legal systems—including American law—the so-called 'rule of recognition' actually incorporates moral criteria and considerations of principle. While these thinkers have offered powerful arguments that there is conceptual space for such a view, nevertheless, when one rereads chapter 5, 'Law as the Union of Primary and Secondary Rules', and sees the crystalline structure envisioned in the first edition, one is tempted to say that the inclusion of principles at both the primary and, through inclusive positivism, the secondary level constitutes a substantial alteration of Hart's original view.[10]

If Hart can be seen as meeting Dworkin half-way on the rules versus principles debate, the same cannot be said for their controversy over the connection between law and social rules. At first blush, Hart is perhaps even more conciliatory on this issue, admitting that '[s]ome of Dworkin's

[4] *CL*, at 259.

[5] *Id.* at 263.

[6] I do not mean to commit myself to the claim that, in endorsing soft positivism, Hart is altering his position. In the Postscript, Hart states his commitment to soft positivism by referring to passages in the 1st edn. of *CL*, and in 'Positivism and the Separation of Law and Morals', where he recognizes the possibility of a rule of recognition that includes moral criteria, as in the US Constitution. *CL*, at 250. On the other hand, given the debate between inclusive and exclusive positivism that has ensued since those works were first published, the relatively scant attention Hart paid the issue previously, and the substantial attention devoted to it here, Hart's declaration that he endorses soft positivism in the Postscript is in and of itself significant.

[7] Jules L. Coleman, 'Negative and Positive Positivism', 11 J. Leg. Stud. 139 (1982), repr. in *Ronald Dworkin and Contemporary Jurisprudence*, ed. M. Cohen (1984) (hereinafter *RDCJ*), 28–48; also repr in Jules L. Coleman, *Markets, Morals and the Law* (1988), 3–27.

[8] E. Philip Soper, 'Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute', in *RDCJ*, at 3–27.

[9] W. J. Waluchow, *Inclusive Legal Positivism* (1994).

[10] But see *supra* n. 6, and sources referred to therein.

criticism of my original account of social rules is certainly sound and important for the understanding of law', and noting that the Postscript offers 'considerable modifications'.[11] However, the text reveals only two concessions to Dworkin on this issue, and neither is particularly significant to Hart's jurisprudence. Hart readily admits that the conventionality of a social practice is not simply a matter of the concurrent practices of members of a group for what may be independent reasons, but involves, in part, conformity with a rule because it is conventionally accepted. And he asserts that his prior account of social rules is only applicable to rules 'which are conventional in the sense I have now explained', and that his practice theory does not provide a 'sound explanation of morality, either individual or social'.[12] On the 'social rules' issue that is weightier in the Hart–Dworkin debate, however, Hart remains firm. He adheres to his original thesis that the social rule account captures the nature of rules of recognition in a legal system: 'But the theory remains as a faithful account of conventional social rules which include ... certain important legal rules *including the rule of recognition.*'[13] In a few dense pages of the Postscript, Hart offers a defence of his analysis of rules of recognition against Dworkin's 'Model of Rules II' critique.

The Postscript's response to the MOR II critique replies mainly to two Dworkinian arguments: the argument from rule-of-recognition normativity and the argument from disagreement. Dworkin's initial presentation of the rule-of-recognition normativity argument runs as follows:

> We must therefore recognize a distinction between two sorts of statements each of which uses the concept of a rule. The sociologist, we might say, is asserting a *social rule*, but the churchgoer is asserting a *normative* rule. We might say that the sociologist's assertion of a social rule is true (or warranted) if a certain factual state of affairs occurs, that is, if the community behaves in the way Hart describes in his example. But we should want to say that the churchgoer's assertion of a normative rule is true (or warranted) only if a certain normative state of affairs exists, that is, only if individuals in fact do have the duty that they suppose they have in Hart's example. The judge trying a lawsuit is in the position of the churchgoer, not the sociologist. He does not mean to state, as a cold fact, simply that most judges believe that they have the duty to follow what the legislature has said; he means that they do in fact have such a duty and he cites that duty, not others' beliefs, as the justification for his own decision. If so, then the social rule cannot, without more, be the source of the duty he believes he has.[14]

In the Postscript, Hart comments that Dworkin's embrace of the idea of a 'normative state of affairs' strikes him as obscure, and that Dworkin appears to neglect the phenomena in which participants in social practices

[11] *CL*, at 255.
[12] *Id.* at 256.
[13] *Id.* (emphasis added).
[14] *TRS*, at 50–1.

cite behaviour of other participants. At a broader level, however, Hart can be understood as saying that Dworkin appears to be adopting a form of moral foundationalism or moral reductionism about normative rules, and that this is implausible both in the legal case and with regard to other social rules. It is not simply that Dworkin rejects the social rules view for law or for social practices. It is that he insists that judges, in reaching conclusions about legal validity, must be operating from premisses about what there is a moral duty to do. And there is no indication that, when Dworkin discusses normative rules or duty imposition or what there is a duty to do, he means anything other than fully-fledged moral duties of judges. Hence, it is not surprising that Hart finds Dworkin's suggestion not only perplexing but also totally implausible from a hermeneutical point of view. For whatever we do within conventional social practices, and whatever judges do in deciding the validity of laws, they seem to be doing something utterly different, and much more practice-bound, than the sort of normative argumentation that Dworkin seems to be advocating. Judges are not deliberating from or reasoning about what it is their moral duty to do. They are deliberating about and reasoning from premisses about what conditions must be satisfied in order for there to be law.[15]

Dworkin's argument from disagreement runs as follows (according to Hart): there is not a rule of recognition that satisfies the conditions that Hart sets out for social rules, since there is often substantial controversy over what criteria ought to be used in assessing legal validity. The social rules model asserts that a rule of recognition is a social rule and a social rule is one that members of a community agree upon. Hart responds to this argument in the Postscript. He answers that Dworkin has excluded the possibility that a rule of recognition may be agreed upon even if its application is not agreed upon. All disagreements which Dworkin takes as evidence that there is no rule of recognition that is agreed upon are better interpreted as disagreements in application of an agreed upon rule.

In his confident rejection of Dworkin's principal MOR II critique, Hart signalled his continuing allegiance to the Social Rules Thesis. Juxtaposing this firm adherence against his equally open-minded embrace of Inclusive Positivism, we are led to a particular view of the sense in which Hart was a positivist, at least in his later years. Neither the Sources Thesis nor the Separation Thesis (in any particularly hard form) appears to have been central to Hart, nor does any particularly harsh thesis about the centrality

[15] This is not to deny that rules of recognition may be viewed by judges as providing the content of what it is their obligation, as judges, to do in deciding cases. Nor is to deny that, for Hart, the theory of rules of recognition as social rules explains the possibility of judges' having duties in applying the law. Neither of these is equivalent to the claim that reasoning from rule of recognition statements is reasoning about duties. See *infra* Part IV.

of rules, as opposed to principles. As Coleman's work suggests,[16] the centre of Hart's positivism might now appear to be the thesis that law is constituted by social facts. With this modification in mind, we might improvise upon Dworkin's work and select 'the model of social facts' as an appropriate catchphrase for a central theme of *The Concept of Law*, as seen through the Postscript.

Dworkin took Hart to be embracing a model of social facts in roughly the following sense: a view that social facts are what make rule-of-recognition statements true, and therefore social facts are what make it the case that the law is one way rather than another. As I shall argue in Part II, this was an understandable and probably correct interpretation of an aspect of the theory Hart intended to be offering. But for reasons I will set forth in Parts III–VI, that view of the relation between legal statements and social facts is untenable, and 'the model of social facts', so interpreted, must be rejected. Part VII argues that, despite evidence that Hart adhered to a 'model of social facts' view, Hart's central jurisprudential aims do not require adherence to a model of social facts. Notwithstanding the critique of Parts III–VI, I argue, an acceptable form of conventionalism is available to Hart. The possibility of a Hartian, conventionalist view of law *without the model of social facts* is the central point of this article.

The rejection of the model of social facts immediately invites another project, however, one which the remainder of the article commences. If rule-of-recognition statements are not made true by social facts, the question arises as to what sort of semantics is available for them. Part VIII offers a very sketchy beginning of a 'legal coherentist' account of the semantics of rule-of-recognition statements and of legal statements more generally, one which is intended to complement a conventionalistic account of law, not to replace it. Part IX transforms the Hartian critique undertaken in most of the article and suggests that, since conventionalism does not entail the model of social facts, a great deal of Hart's work about the conventional nature of law may also be available to Dworkin.

In brief, I aim to show that Dworkin's rejection of Hartian positivism as a theory of the subject matter and truth conditions of legal statements is consistent with Hart's adoption of conventionalism in descriptive jurisprudence. While inclusive positivism can be seen as a partial reconciliation of Hart and Dworkin on the rules/principles debate, *coherentist conventionalism* brings us closer to a reconciliation of Hart and Dworkin on the respects in which law depends for its existence on social practices. Understood as a semantic and metaphysical picture—as a model of legal facts resting upon social facts—Hart's conventionalism is seriously

[16] See e.g. Coleman, *supra* n. 7; Jules L. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' (this volume).

misleading, but understood as a means of grasping the constructive nature of law and legal concepts, it is a startling philosophical achievement.

II. THE MODEL OF SOCIAL FACTS

Much of the debate over Dworkin's critique of Hart's 'model of rules' goes to the question of whether Hart in fact entertained the view that Dworkin labelled 'the model of rules' in anything like the manner Dworkin alleged. Without entering that controversy, one can at least take a lesson from it. This debate counsels caution in attributing yet another 'model' to Hart—the model of social facts—particularly since the phrase 'the model of social facts' (like 'the model of rules') is not Hart's (in this case, my own), and the attribution will set the stage for my critique of Hart. The reader should bear in mind not only that there is significant textual support for the following attribution, but also that I shall later in the essay conjecture a second interpretation of Hart's conventionalism that is immune from the objections I am offering. In this respect, the attribution of 'the model of social facts' view to Hart is in part an exegetical device.

If Hart's positivism is (as Coleman suggests[17]) characterized by a view of the centrality of social facts to the law, then he must be interpreted as holding quite a substantial thesis about the connection between law and social facts. An example of a thesis that is too weak is the thesis that law would not exist as an institution if people did not behave in certain ways —that certain facts about human conduct and attitudes are a necessary condition for the existence of human law. The model of social facts must say more than this, for Dworkin and perhaps even Aquinas and natural law theorists seem committed to this. It is therefore not enough to single out positivism. A slightly stronger claim is that social practices 'make law possible', but again, this claim is certainly held by thinkers such as Dworkin and Fuller, and therefore is not definitive of a positivistic conception of law.[18]

[17] One of Coleman's characterizations of the 'Social Facts Thesis' is 'the claim that while law is a normative social practice it is made possible by some set of social facts'. Coleman, *supra* n. 7, at 395. In fact, he suggests that this is 'the distinctive feature of legal positivism', and cites Austin, but it is clear that Coleman takes Hart and *CL* to represent an exceptionally good example of a form of positivism that recognizes the centrality of a social facts thesis.

[18] *Id.* at 397. The modal formulation quoted in the text is offered by Coleman subsequent to two slightly different formulations. 'The distinctive feature of legal positivism is that it attempts to explain law in terms of *social facts*.' *Id.* at 395. The emphasis on 'explanation' here is epistemic (or methodological), as opposed to modal. Between the epistemic formulation on 395 and the modal formulation on 397 is a hybrid epistemic/modal formulation: 'The

The Concept of Law suggests a deeper and broader sense in which Hart conceived of law in terms of a model of social facts. He appears to maintain that a statement about what the law is is made true by certain social facts—facts regarding the conduct and attitude of certain persons in the community, and relatedly, facts about what the law is consist in facts about the conduct and attitude of certain persons. When I refer to 'the model of social facts', that is what I shall be referring to.

Two prominent passages in *CL* , taken together, support attributing the model of social facts to Hart. In discussing the distinction between internal and external statements, Hart comments that a rule of recognition is unlike other rules in a system. 'The assertion that it exists can only be an external statement of fact',[19] by which he means facts about the acceptance of a rule of recognition. And in discussing the special role of a rule of recognition, Hart concurred with prior philosophers that statements about the legal validity of primary rules 'do indeed carry with them certain presuppositions'.[20] Crucially, he goes on to say of such a rule of recognition that it is not only accepted by the person who presupposes it 'but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, *it could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance or acquiescence in these identifications.*'[21]

Of course, Hart believed that what made it true that a certain statute was valid was that it satisfied the criteria set forth in the rule of recognition in force in the legal community. It thus becomes pivotal to whether a statute is valid law whether a particular rule of recognition is in force. As the prior paragraph indicates, Hart thought: (i) there was no sense in which it could be the case that a rule of recognition was in force in a legal community, except that certain social facts existed (e.g. it was accepted); (ii) certain social facts existing did indeed make it true that a rule of recognition was

organizing idea of legal positivism is that law's possibility must be explained in terms of social facts. I call this the Social Facts Thesis, and nothing is more important to legal positivism.' *Id.* at 396–7. Coleman expressly rejects the idea that the social facts thesis requires reductionism about legal statements, and notes that Hart's insistence on capturing the internal point of view precluded reductionism. This leaves open the possibility of attributing to Hart the view I put forward in the text, that social facts made legal statements true (one need not concede that the force or meaning of such statements was 'reduced' to social facts). While Coleman mentions supervenience, the idea is not developed, and there is properly no attribution of a supervenience view to Hart himself.

A second interpretation of Hart's social facts thesis, which I offer in Pt. VII, resembles the epistemic and methodological aspect of Coleman's view, but (a) does not emphasize the modal aspect and (b) does not claim centrality in accounting for the authority of law. Moreover, I am much less confident than Coleman that a model of social facts thesis so construed is in and of itself a form of positivism, let alone the core of positivism.

[19] *CL*, at 110.

[20] *Id.* at 108.

[21] *Id.* (emphasis added)

in force. The upshot seems to be that social facts 'established' the truth of the presupposition used by those identifying the valid norms of a system. For this reason, facts about social practices appear to be what make statements about the validity of primary rules true, and the validity of primary rules appears to consist, in part, in the social facts existing in light of which the primary rules' possession of certain attributes makes them law. This is both the evidence that Hart endorsed the model of social facts and the defence he offered for it.[22]

The model of social facts so understood is appealing both as an effort to represent a broad strand of positivism and more generally. With regard to the former, the model of social facts replaces—but retains the same spirit as—the Austinian idea that whether a command is *law* turns on how that command is 'positioned', and how it is positioned is a matter of social and historical fact about the position and conduct of the issuer and audience of the command. While positivism's emphasis on separation is no doubt important to its significance and what some view as its essence, Austin can be interpreted as arguing for separation from this more basic point that the status of being law turned on actual position, and actual position was a matter of social and historical fact. Hart clearly took it to be a central part of his project in *The Concept of Law* to rescue this tradition of thinking about law from its own errors and limitations. Facts about patterns of obedience and actual issuance of command are replaced, in part, by facts about general obedience and official acceptance of a rule of recognition. But, arguably, it remains the case that what makes it true that a putative law is valid law is that certain social facts obtain; this is at least true of the rule of recognition and derivatively of all norms, for they get their validity from the rule of recognition.[23] The model of social facts so construed renders Hart's social rules theory a recognizable form of positivism in the spirit of Austin.

Dworkin's attack on Hart in MOR II is perhaps more easily understood as an attack on the model of social facts, so interpreted, than as an attack on a model of rules. For his fundamental complaint is that, for Hart, the 'existence of the social rule, and therefore the existence of the duty, is

[22] As one reader has correctly pointed out, this passage is far from conclusive evidence that Hart endorsed the model of social facts. What is needed is an argument that Hart did not simply mean that the existence of the rule of recognition could be demonstrated—that he additionally thought this could make true the social fact statement that was part of the discursive justification in question. The passage itself does not confirm this interpretation. Later in this essay, I offer further reasons for supposing Hart might have had this in mind. See *infra*, Pt. VII. However, as indicated above, the attribution of the model of social facts to Hart is tentative, and is ultimately complemented by a somewhat different view, consistent with the caveat offered at the beginning of this footnote.

[23] The effects of Hart's embrace of Soft Positivism on this view are discussed in VII, *infra*.

simply a matter of fact'.[24] As we shall see, it is far from clear whether it really matters to Dworkin whether there are social conventions, agreements, or social rules of the sort he denies. What is plainly vital to Dworkin's position, however, is his denial that the existence of legal rights and duties, or the validity of putative laws, is simply a matter of social fact.

III RULES OF RECOGNITION AND THE MODEL OF SOCIAL FACTS

This part has three aspects: interpretive, constructive, and critical. At an interpretive level, it aims to discern, through a sort of dialectical exegesis, what Hart meant by 'rule of recognition' and what roles were played by rules of recognition in his theory, as well as what is meant by 'internal statement' and 'external statement'. At a constructive level, it sketches a conventionalistic theory of rules of recognition along the lines endorsed by Hart in the Postscript and suggested in this volume by Andrei Marmor.[25] At a critical level, it launches the central argument of the article, that rule-of-recognition statements are not made true by social facts.

A. Ambiguities in the phrase 'rule of recognition'

In *The Concept of Law*, Hart uses the phrase 'rule of recognition' in three interrelated ways. First, he sometimes suggests that rules of recognition are linguistic entities that designate what the primary rules of the system are (famously, through designating the criteria for legal validity). Thus, Hart's first example of a rule of recognition is 'an authoritative list or text of the [primary] rules to be found in a written document or carved on some public monument'.[26] In the Postscript, and in 'Positivism and the Separation of Law and Morals',[27] Hart suggests that the United States Constitution may be a part of the rule of recognition in the American legal system, and this is certainly an example of a text.[28] The tendency to see the rule of recognition in this way is further supported by the fact that primary rules of a legal system are very plausibly identified with linguistic entities—with texts—and Hart appears to regard primary rules and secondary rules as different species of the same type of thing—rules.

[24] *TRS*, at 50.

[25] Marmor, 'Legal Conventionalism' (this volume). The view here is more consonant with Marmor's constitutive conventionalism than with Coleman's coordinative conventionalism.

[26] *CL*, at 94.

[27] 71 Harv. L. Rev. 593 (1958).

[28] *CL*, at 250.

Second, Hart often suggests that the rule of recognition is what certain linguistic entities (such as certain provisions within the United States Constitution) express. The rule of recognition, on this view, is the designation of standards or criteria that determine what the primary rules of the system are. But no particular verbal formulation *is* the rule of recognition. Such formulations merely *express* it. On this view, the rule of recognition is a proposition that sets forth the standards which determine what the primary rules of a legal system are. It is plain that the first, purely linguistic aspect is inadequate for interpreting *The Concept of Law*: 'In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule.'[29] 'The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view.'[30] Moreover, Hart frequently speaks of acceptance of a rule, by which he means accepting *that certain criteria determine which putative norms are legally valid*, and accepting the latter is accepting something of a propositional order.

Third, and most famously, Hart frequently claims that a rule of recognition is a particular kind of social practice, which he calls a 'social rule'. This claim, and the analysis of social rules to which it is conjoined,[31] lie at the core of his account of law,[32] as recent scholarship suggests.[33] The conceptualization of a rule of recognition as a social rule of treating putative legal norms in a particular manner is seemingly confirmed by Hart himself in the Postscript:

> My account of social rules is, as Dworkin has also rightly claimed, applicable only to rules which are conventional in the sense I have explained. This considerably narrows the scope of my practice theory and I do not now regard it is a sound explanation of morality, either individual or social. But the theory remains a faithful account of conventional social rules which include . . . certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.[34]

Hart's three different uses of the phrase 'rule of recognition' unfortunately gives rise to a certain amount of confusion. To begin with, it would appear that several aspects of his theory hinge on certain attributes of rules of recognition, and yet if 'rule of recognition' simultaneously refers to things in different ontological orders, it is unclear whether all the asserted attributes could coexist. For example, it is vital to Hart's theory

[29] *Id.* at 101.
[30] *Id.* at 102.
[31] *Id.* at 55–6.
[32] *Id.* at 116–17.
[33] See e.g. Coleman, *supra* n. 7; Marmor, 'Legal Conventionalism'; Scott J. Shapiro, 'On Hart's Way Out' (this volume).
[34] *CL*, at 256.

that rules of recognition state criteria that primary legal rules satisfy or fail to satisfy. This feature seems to require the first or second version of 'rule of recognition' as something propositional. But it is similarly vital to Hart's rule of recognition that it is a social practice of judges. Yet a social practice is not something propositional, and a linguistic or propositional entity is not a practice of judges.

Beyond this basic concern about the different orders of propositions and practices, the demonstration of three uses illuminates Dworkin's central contention in MOR II, that Hart is mistaken in treating rule of recognition existence as merely a social fact. Hart presents this criticism in the Postscript as follows:

> Dworkin's central criticism of the practice theory of rules is that it mistakenly takes a social rule to be constituted by its social practice and so treats the statement that such a rule exists merely as a statement of the external sociological fact that the practice conditions for the existence of the rule are satisfied. That account cannot, so Dworkin argues, explain the *normative* character possessed by even the simplest conventional rule. For these rules establish duties and reasons for action to which appeal is made when such rules are cited, as they commonly are, in criticism of conduct and in support of demands of action. This reason-giving and duty establishing feature of rules constitutes their distinctive normative character and shows that their existence cannot consist in a merely factual state of affairs as do the practices and attitudes which according to the practice theory constitute the existence of a social rule.[35]

Applied to the context of law, Dworkin's criticism can be put as follows: secondary legal rules articulating standards of validity for putative legal norms are put forward as reasons justifying the acceptance or rejection of putative legal norms, and justifying the [judicial] conduct that acceptance of such putative legal norms would entail. The secondary legal rules are in this important sense normative. Yet on Hart's theory, a rule of recognition is merely a social practice that exists. This is not of the right category to justify.

At a simplistic level, this argument is sound. For if a rule of recognition is simply a practice, then that entity will not justify any more than, for example, an automobile will. But the real question is whether the fact that such a practice exists (or the statement that such a practice exists) is capable of justifying the acceptance or rejection of a putative legal norm. Once we rephrase the position so that there is a propositional entity (proposition or sentence) alleged to be justifying the acceptance of legal norms, it is no longer obvious that it is categorically incapable of doing so.

A natural Dworkinian response would be that the assertion of a certain state of affairs could justify a putative legal norm only if there is a

[35] *Id.* (citing *TRS*, at 48–58).

suppressed normative premiss such as: *a judge has a duty to accept a legal norm only if it satisfies the criteria that as a matter of fact are deemed necessary within the practice.* While the existence of a social practice will suffice to establish one of the premisses, it will not suffice to establish the other, plainly normative premiss, and the rule of recognition (taken as a practice) will function as a secondary legal norm only if it has both components.

The important thing to see about this version of Dworkin's critique is that it has virtually nothing to do with the relation between law and morality as that debate is traditionally conceived. Indeed, Hart would not necessarily face this objection (though he would face others) if he simply took the position that purely source-based criteria of legal validity ought to be used. Dworkin's objection, here, is not that Hart fails to interconnect criteria of legal validity with the moral fabric of the universe. Nor is it (as Hart explicitly conjectures) that a social rule does not exist unless there are good moral grounds for complying with it. It is that he fails to recognize that a rule of recognition cannot be merely a social practice if it is meant to function as a standard that justifies the assertion of legal norms, because such standards must by their very nature have the normative force of a secondary legal rule. While the fact of a social practice may be normatively significant, neither that fact nor a sentence expressing it itself has the propositional content of a secondary legal rule. The criticism, at root, is not an accusation of moral conventionalism; it is the specification of a category error in the assertion that a social practice (or a sentence describing it) could be something with the propositional content of a secondary legal rule. As the discussion above reveals, Hart's threefold ambiguity in the use of the phrase 'rule of recognition' renders him vulnerable to this objection.

B. Conventions and the uses of 'rule of recognition'

The ambiguity of 'rule of recognition' in *The Concept of Law* is not, I shall argue, an insoluble problem. I shall offer an interpretation of Hart's theory that explains how a rule of recognition can figure both as a secondary legal rule and as a social practice. I shall suggest that Hart himself held roughly the view I develop and, indeed, that the appearance of equivocation by Hart was illusory. Moreover, I shall argue, Hart is able to respond to Dworkin's normativity argument while retaining his practice conception of rules of recognition. Nevertheless, I conclude that a cogent account of conventionalism in law ultimately requires an abandonment of the model of social facts as many positivists—and possibly Hart himself—have understood it.

The view I offer borrows from and builds upon David Lewis's work in

Convention, A Philosophical Study[36] and, more particularly, his subsequent article 'Languages and Language'.[37] While both of these works were published after *The Concept of Law*, I agree with a number of commentators that Lewis's work sheds light on Hart.[38] Unlike Marmor and Postema, however, it is not Lewis's analysis of certain social practices as conventions that I shall draw upon. Rather, I shall focus on his demonstration of the *dual* nature of semantic theory, and argue that legal theory has a similar dual nature. The point of this interlude is, however, quite indirect, and quite unrelated to Lewis's views or to language. Displaying the dual nature of legal systems will lead to an analysis of rules of recognition as propositions and as social rules.

According to Lewis, one aspect of semantic theory is the specification and analysis of certain kinds of systems of semantic entities that fit together in certain ways and have certain important formal properties—specifically, that are functions from strings of symbols to meanings: languages.[39] A second aspect of semantic theory is an analysis of what the phenomenon of linguistic communication is as a rational social practice within a community; this is an inquiry into the nature of language. Lewis saw how these two aspects of semantic theory could be understood to pose a single, and third, challenge: what is it for a *language* (in the first sense of a system), to be the *language of a community* (in the second sense)? Lewis's well-known theory of conventions was used to answer this second question; for a community to have a language was for it to have a conventional pattern of behaviour and belief through which its members communicated with one another. But Lewis fused the first and second answers to produce an answer to the third: a language was *the language of a community* if the members of the community behave and think a certain way *with respect to certain features of that language (analysed as a certain kind of system)*.

The Concept of Law is best understood as containing (at least) two aspects of jurisprudential theory, just as Lewis addresses two aspects of semantic theory. Hart addresses the question: what is a legal system? His answer is that 'a legal system is a complex union of primary and secondary rules'.[40] This account is intended as a sophisticated alternative to Austin's deeply flawed command theory. A profoundly important aspect of this theory is of course that a legal system is internally self-sustaining because of the existence of rules of recognition, rules of change, and rules of adjudication.

[36] *Convention: A Philosophical Study* (1969).

[37] In *Minnesota Studies in the Philosophy of Science* 7, ed. Keith Gunderson (1975), 3–35; repr. in David Lewis, *Philosophical Papers* 1 (1983), 163–88.

[38] See Marmor, 'Legal Conventionalism'; G. J. Postema, 'Coordination and Convention in the Foundations of Law', 11 J. Leg. Stud. 165 (1982).

[39] 'Languages and Language', at 163.

[40] *CL*, at 114.

Just as Lewis recognized the essentially social nature of language even as he offered a formal account of language as a system, Hart also recognized that to understand law is, in part, to understand how a legal system is connected to a community—that is, in significant part, what his theory of social rules is used for. Moreover, like Lewis, Hart explicitly recognized that an account was needed to connect the system to the community; he recognized that the account of law as a union of primary and secondary rules 'is not all that is needed to describe the relationships to law involved in the existence of a legal system'.[41] He supplemented this account with the following:

> There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.[42]

This passage is phrased as an analysis of 'the existence of a legal system', but that phrase is elliptical. More precisely, it is the analysis of what it is for a legal system to be the legal system *of a particular community*: the members of that community must generally obey rules of behaviour that are valid according to the system's ultimate criteria of validity, and the legal officials of that community must effectively accept the rules of recognition, change, and adjudication as common public standards.

With these aspects of Hart in mind, let me return to the topic of rules of recognition. What kind of thing is a rule of recognition? Clearly, Hart categorized rules of recognition as secondary rules within legal systems. As such they have propositional content and they are normative in nature. They specify that certain putative legal norms are valid and others are not. It is essential to the content of such a rule that it designate which norms are valid and which not. Whether or not rules of recognition are themselves members of legal systems (and Hart clearly believed they were), they are essential to characterizing each legal system, just as, in the linguistic example, a proposition or set of propositions stating the truth conditions of each sentence is essential to a language.

What, then, can we say about Hart's frequent and pivotally important statements that rules of recognition are social rules? I think this is merely an imprecise way of saying that for a rule of recognition of a legal system (considered as an abstract union of primary and secondary rules) to be the rule of recognition *of a community* is for there to be a certain kind of social

[41] *Id.* [42] *Id.* at 116.

practice among the legal officials in that community of accepting that rule of recognition (considered as a propositional entity). Indeed, just as it is an attribute of the proposition that the earth is not flat that it is widely believed among educated persons today, and an attribute of the proposition that the sentence 'My coffee is hot' is true if and only if my coffee is hot that it is accepted by English speakers, it is an attribute of the proposition that a statute must not violate the United States Constitution to be valid, that it is accepted (and treated as a social rule) by American judges. Hence, according to Hart's view, it is true of rules of recognition of *extant* legal systems that they are *social rules for the legal officials of some community*. This is not, however, to say that a social practice is the very kind of thing a rule of recognition is. It is to describe an attribute of certain rules of recognition. Of course, if we are limiting our view (as we might) to rules of recognition of extant legal systems, then it is an attribute of all such rules, and, moreover, an attribute that is critical to the existence of those legal systems. It is therefore not surprising that Hart can be found suggesting that rules of recognition *are* social rules, as in the aforementioned passage from the Postscript.

> My account of social rules is, as Dworkin has also rightly claimed, applicable only to rules which are conventional in the sense I have explained. This considerably narrows the scope of my practice theory and I do not now regard it is a sound explanation of morality, either individual or social. But the theory remains a faithful account of conventional social rules which include . . . certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.[43]

I am suggesting that Hart should be interpreted as saying that the practice account of social rules is aimed to account *not for what a rule of recognition is*, but rather for *what it is for a rule of recognition to be the rule of recognition of a particular legal community*. This, in turn, (partially) explains what it is for a legal system to be the legal system of a community.

This interpretation of Hart leads me to offer quite a different response to Dworkin's critique from that offered by Hart himself in the Postscript. Dworkin is right that secondary rule discourse—including the articulation of rules of recognition—figures in the justification of legal claims, and of actions pursuant to those claims. But, for the reasons already articulated, this does not undercut the contention that it is an important attribute of certain rules of recognition—those which count as the rule of recognition of a legal community—that there is a particular kind of social practice of accepting the rule among legal officials.

[43] *Id.* at 256.

Let us now turn to the question of whether a rule of recognition, for Hart, is a proposition or a particular formulation. The overwhelming evidence is that Hart intended 'rule of recognition' to refer, in its primary sense, to that which particular verbal formulations *expressed*, and that he did not intend it to refer to the formulation itself. In addition to the passages cited above, Hart nowhere makes the implausible claim that there is a particular formulation in each legal community that all regard as the ultimate criterion. On the contrary, his contention that there is a widely accepted ultimate standard of law, notwithstanding apparent explicit controversy over standards, commits him to the view that there is an implicit acceptance of a norm, whose proper formulation remains problematic. Indicating agreement with several of his followers, Hart also recognizes that the application of this criterion may also be in dispute.

C. The distinction between secondary legal rule statements and social fact statements

This account leads us to a fundamental distinction between two types of sentence relating to secondary legal rules. One type of sentence expresses a secondary rule that states criteria for the validity of primary rules. For example, the sentence 'No putative law is valid unless it has been duly passed by Congress' expresses the proposition that no putative law is valid unless it has been duly passed by Congress. The latter proposition is a secondary legal rule: a proposition that is a standard of legal validity for primary legal norms. Relatedly, the sentence 'No putative law is valid unless it has been duly passed by Congress' *means that* no putative law is valid unless it has duly passed by Congress. A sentence that takes as its meaning a secondary legal rule will be termed a 'secondary legal rule statement'.

A rather different type of sentence asserts that some secondary legal rule has a particular status in a particular legal community, to wit, has the status of being accepted as a social rule in that community. For example, 'It is a criterion of validity in the American community that no putative law is valid unless it has been duly passed by Congress.' The proposition which this sentence expresses is the proposition that some other, normative, proposition (*no putative law is valid unless it has been duly passed by Congress*) is treated as providing a condition of legal validity in the American community. Plainly, a proposition about how a group of people treats a particular normative proposition is not itself a normative proposition (even though it could be normatively significant). It is a proposition of social fact. Likewise, the sentence that expresses the proposition asserts

that a social fact exists. I shall therefore designate such a statement a 'social fact statement'.[44]

I have argued above that rules of recognition, for Hart, are propositional entities. They are the sorts of things that are expressed by sentences such as: 'No putative law is valid unless it is passed by Congress under a power that Congress enjoys.' While this is perhaps only a partial rule or recognition—and I am willing to leave open the possibility that there is a hierarchical structure with a single all-encompassing rule of recognition—a fuller one might include both a disjunction of possible sources or exceptions to source requirements, and either embedded or distributive necessary conditions that would defeat such authorizing conditions.[45] The important point on the model I have constructed is that rules of recognition are propositions about what features of putative norms make them valid law, propositions whose acceptance by legal officials is constitutive of a legal system being the legal system of a community. Because they are propositions, however, they are at least in principle the sort of things that could be expressed in language.

The question then arises as to how one would properly categorize a statement that asserted rule of recognition. There are two important preliminaries to answering this question. The first is that the question is not simply about speech act types. It is about sentence types. It is one thing to provide an analysis of the speech act of a judge uttering 'Statutes passed by a majority but vetoed, and then not overridden by at least two-thirds of each house, are law' in the course of declining to apply a particular statute. The act of the judging in uttering that statement can be viewed as the speech act of expressing acceptance of and allegiance to a particular social practice, that of applying the aforementioned rule. On the other hand, there is the question of what the sentence itself means, and relatedly, what would make it true.

The second and related point is that the question is not about a particular statement within each community—i.e. the one that expresses the rule of recognition of that community. Nor is it about an equivalence class of such sentences. The question is about the category of sentence that putatively expresses a rule of recognition of a linguistic community. A person—say, a law student—could presumably mis-state the rule of recognition of the community. The statement she or he uses to mis-state

[44] The distinction between secondary legal rule statements and social fact statements relates to, but is distinct from, both Hart's distinction between 'internal statements' and 'external statements' (see *infra* III (D)) and Dworkin's distinction between 'normative rules' and 'social rules'. See *infra*, IV.

[45] Cf. Neil MacCormick, *H. L. A. Hart* (1981), 110 (setting forth, as a rule of recognition, conjunction of universally quanitified propositions that designate putative norms as laws if they satisfy certain conditions).

the rule of recognition of the community presumably could have the same form as a statement that properly expressed the rule of recognition. Thus, for example, the statement 'Any law that the vice-president vetoes is not valid law' is a rule-of-recognition statement, in the sense that it purports to provide (part of) a rule-of-recognition. More particularly, a semantics of rule-of-recognition statements must be broad enough to cover inaccurate statements as well as accurate ones.

With these preliminaries in mind, recall that there are certain forms of statement that express complex propositions about what features of a putative legal norm make it valid law. These are secondary legal rule statements. A rule of recognition is a secondary legal rule, albeit a particularly important one. Statements expressing propositions appropriately complex and basic to be a rule of recognition are simply examples of secondary legal rule statements. By contrast, a statement that asserts that a certain rule of recognition (proposition) is accepted within a legal community as a social rule is a social fact statement about a rule of recognition. Both secondary legal rule statements of putative rules of recognition and social fact statements about rules of recognition are general types. Each is capable of being correct or mistaken.

D. Hart on internal and external statements

In several respects, it appears that the distinction I have drawn between secondary legal rule statements and social fact statements would have been congenial to Hart. Indeed, it might be deemed an application (to secondary legal rules) of a distinction that Hart is to be credited with having made—the distinction between internal statements and external statements.[46] What I have called a 'secondary legal rule statement' resembles a Hartian 'internal statement'; it is used by those involved in applying the law to justify assertions that particular legal norms are valid, and it is accepted as a sound criterion of validity; its utterance 'manifests the internal point of view and [it] is naturally used by one who, accepting the rule of recognition and without stating the fact that it is accepted, applies the rule in recognizing some particular rule of the system as valid'.[47] By contrast, what I have called a 'social fact statement' would appear to be an 'external statement': 'it is the natural language of an external observer of the system who, without himself accepting its rule of recognition, states the fact that others accept it.'[48] Moreover, the framework I have constructed is useful for making one of the principal negative points Hart intended to establish with this framework: that it is a category error to suppose (with Holmes) that to assert

[46] *CL*, at 102–3. [47] *Id.* [48] *Id.* at 103.

the validity of a legal norm was to make a prediction regarding officials' behaviour.[49]

Nevertheless, there are several notable differences between Hart's framework and that which I have put forward. First, the category of 'internal statement' is defined, by Hart, in terms of the point of view of those who utter it.[50] Second, the maker of an internal statement must, by definition, presuppose a rule of recognition. Neither of these is essential to my account of a secondary legal rule statement (as opposed to a social fact statement). Third, internal statements appear to be principally (and perhaps only) about the validity of putative legal norms—largely primary norms, one presumes. It is simply not clear how Hart intended it to apply to secondary legal norm assertions, if at all; my account is of course precisely about secondary legal norm assertions. Fourth, and working from my own account, the characterization of secondary legal statements is precisely in terms of their propositional content. Propositional content is not principally, if at all, what drives Hart's distinction; rather, it appears to be the pragmatic context of assertion.

The difference in the framework is most pronounced and important when it comes to rules of recognition themselves. With regard to other sorts of rule, Hart held the rather nuanced position that an internal statement might actually be viewed as presupposing a rule of recognition and asserting the validity of another rule under it. Insofar as he maintained this position, he was recognizing a possibly different propositional content. However, with regard to expressions of rules of recognition, he rejected the possibility entirely:

> In this respect, however, as in others, a rule of recognition is unlike other rules of the system. The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.[51]

This was not to deny that speakers could ever express rules of recognition, or could ever do so from the internal point of view.[52] It was to say that the propositional content of such an assertion must be the same as that of the external statement itself.

E. The nature of rule-of-recognition statements: the first argument against the model of social facts

As suggested in Part II, Hart's denial that there is any existence to a rule of recognition, apart from social fact, and the analysis of rule of recogni-

[49] *Id.* at 104–5. [50] *Id.* at 102. [51] *Id.* at 108. [52] *Id.* at 106–10.

tion statements upon which it rests, plays a foundational role in the structure of his theory. It is made in the context of a discussion in which he asserts the ultimacy of certain secondary legal rules. The question whether or not a putative legal norm is law for Hart ultimately turns on certain secondary legal rules. Yet whether those legal rules are applicable—whether they exist—is ultimately a matter of social fact.

> Some writers, who have emphasized the legal ultimacy of the rule of recognition, have expressed this by saying that, whereas the legal validity of other rules of the system can be demonstrated by reference to it, its own validity cannot be demonstrated but is 'assumed' or 'postulated' or is a 'hypothesis'. This may, however, be seriously misleading. . . . First, a person who seriously asserts the validity of some given rule of law, say a particular statute, himself makes use of a rule of recognition which he accepts as appropriate for identifying the law. Secondly, it is the case that this rule of recognition, in terms of which he assesses the validity of a particular statute, is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, it could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications.[53]

Together these two premisses are intended to yield the conclusion that whether a putative legal norm is valid is ultimately a matter of social fact. Hart's insistence that rule-of-recognition statements can only be *external* statements is in this way basic to the model of social facts that has been attributed to him.

The analysis thus far provides at least a prima facie argument that, in asserting that rule of recognition statements are made true only by social facts, Hart has made a mistake. While social facts pertaining to actual practice will confirm the truth or falsity of a statement that a certain rule of recognition (proposition) has the status of a social rule within a community of officials, that does not apply to statements of the rule of recognition. For example, it will confirm whether it is the case that American legal officials treat the proposition that *laws otherwise valid are not invalidated by a vice presidential veto* as law or whether they treat the proposition that *circuit court opinions expressly designating themselves as lacking precedential value are not precedent* as a social rule: whether they act in accordance with it and expect such action of others, and conform in part because of the mutual expectation of others. But such facts do not suffice to confirm or disconfirm the (putative) rule of recognition norm itself, e.g. the proposition that laws otherwise valid are not invalidated by a vice-presidential veto, or the proposition that circuit court opinions expressly designating themselves as lacking precedential value are not precedent.

[53] *Id.* at 108.

To think otherwise is to commit a category mistake. It is of some significance whether circuit court opinions designating themselves as lacking precedential value are precedent or not. This is a matter of law. It is also of siginficance whether a certain pattern of attitude and behaviour with respect to that proposition exists—a matter of social fact. But these two matters of significance are not the same.

Perhaps the simplest argument for the difference between these two matters is that one is embedded in the other. As argued above, what it is for a putative rule of recognition to be the rule of recognition in a particular legal community is for the legal officials of the community to accept that proposition, and act in accordance with it. It follows that the content of the putative rule of recognition must be a different proposition from the proposition that a particular rule of recognition is accepted by the group.

A difference between these two matters entails a difference between the two kinds of statement expressing the respective matters: social fact statements and secondary legal rule statements. A statement that members of a community treat a particular secondary legal rule as their rule of recognition is distinct from an assertion of that secondary legal rule. The former is an example of a social fact statement. It is made true by the proposition that a particular group of people behave a certain way, and confirmed or disconfirmed by evidence regarding the conduct of those persons. The latter is secondary legal rule statement. It is made true by a certain legal state of affairs obtaining—by it being the case that the legal proposition asserted does obtain (e.g. that laws otherwise valid *are not* invalidated by a vice-presidential veto, or that circuit court opinions expressly designating themselves as lacking precedential value *are not* precedent).

The foregoing argument against Hart, if sound, undercuts the model of social facts. Parts IV and V present arguments to supplement the basic argument from the distinction between statements that assert that there is a practice of accepting a certain proposition, and statements that assert the proposition. These supplementary arguments are suggested by Professor Dworkin's critique of Hart in MOR II.

IV. THE ARGUMENT FROM RULE-OF-RECOGNITION NORMATIVITY

The MOR II critique of the social rules theory of rules is put in terms of a distinction between a statement of a social rule and statement of a normative rule. A statement of a social rule, according to Dworkin, is an assertion that people behave in a particular way and take up certain critically reflective attitudes, and it is true (warranted) just in case the members of

the community so described do in fact behave as described, and take up certain attitudes, etc. A statement of a normative rule, however, asserts not that people do in fact behave in some way (although they might, so far as the normative rule statement goes) but that they have a duty to behave in that manner, and it is true (or warranted) just in case they do have such a duty.[54] Dworkin's crucial point is that when a judge decides to apply a law because, for example, the legislature has enacted the law, his reason is that there is a duty to follow what the legislature has said. That is articulated by the statement of the normative rule. On Hart's model, however, the judge deploying a rule-of-recognition statement to justify his decision is deploying a statement of a social rule, not a normative rule. Hence, he is supporting his decision with a statement that others believe there is such a duty (or act in conformity with such belief), not a statement that there is such a duty, on Hart's model. But such an appeal surely does not justify a judge's decision that he does have a duty to follow the law on a particular occasion. That decision requires support from the normative premiss, not the sociological one: 'the social rule cannot, without more, be the source of the duty he believes he has.'[55]

The Dworkinian critique weaves together negative and positive strands of argument. From a critical point of view, Dworkin is arguing that Hart's analysis of rules of recognition in terms of social rules is unable to capture the nature of a judge's decisions applying the law, because those decisions have a normative aspect that Hart's theory omits. From a constructive point of view, he is offering the materials for building an account of that judicial decision—a framework according to which a judge is deliberating about what it is her or his duty to do. As indicated in the introduction to this article, Hart's reply to Dworkin's objection asserts the implausibility of supposing that moral reasons bearing upon the existence of a judge's duty are the only or principal sorts of reasons guiding her conduct. Even if we accept the forcefulness of this reply to Dworkin, it is evidently only a reply to the positive strand. It does not respond adequately to the charge that there is something in the nature of judicial decision-making that is not captured by the model of social facts.

A variation of this argument can be framed in terms of the distinction I have drawn in the preceding section between secondary legal rule statements and social fact statements.

Consider a judge who reasons as follows:

(1) 'Whatever the legislature has duly enacted by a majority vote is valid law.'
(2) 'Statute 44, stating that one is prohibited from fishing in the month of

[54] *TRS*, at 51. [55] *Id.*

May and setting a fine of $100 for violations of this prohibition, was duly enacted by the legislature by a majority vote.'

(3) 'Fishing in the month of May is prohibited. Whoever violates this statute shall be fined $100. Statute 44.'
(4) 'Jones fished in May of 1999.'
(5) 'Jones violated Statute 44.'
(6) 'Jones shall be fined $100.'
(7) 'Jones is hereby fined $100.'

The first statement in this justification, (1), is a (partial) rule-of-recognition statement.[56] The question arises as to whether it is a secondary legal rule statement or a social fact statement. However, when we look at the justificatory role it is required to play in this argument, we see that it cannot be a social fact statement. Whatever (1) is, if we are to capture judicial argumentation as offering genuine warrants for their conclusions, then (1) must be something whose content conjoined with (2) will yield (3). But if (1) is interpreted as a social fact statement, then it is equivalent in content to: *the judges in the American legal community accept as a social rule the proposition that whatever the legislature has duly enacted by majority vote is valid law.*

What follows from its conjunction with (2) is

(3') 'Under the rule judges in the American legal community accept as a social rule, statute 44 is valid.'

(3') does not mean the same as (3). (3') does not, in conjunction with (4), yield (5), (6), and (7).

Therefore, (1) cannot be interpreted as a social fact statement.

The argument obviously generalizes into an argument that *insofar as rule-of-recognition statements* are part of what judges use to justify assertions that certain putative legal norms are valid law, and to warrant their applications of this law, rule-of-recognition statements cannot be merely social fact statements. Since, on Hart's own theory, rules of recognition are secondary legal rules that provide the criteria of validity for putative laws, and since on his theory judges at least implicitly do employ rules of recognition in deciding what the law is, the analysis of rule-of-recognition statements as social fact statements must be rejected.

Hart might have several replies to this criticism. First, note that his distinction between internal statements and external statements does not help him to avoid the problem I have identified. It would give him two options. The first, which seems to match what Dworkin anticipates for Hart, is that he would say (1) was an internal statement. As such, the

[56] It may be complained that (1) is really a rule of change statement. Nothing turns on whether the example concerns a statute that was passed (seeming to indicate a rule of change) or, e.g., a set of decisions by courts, not purporting to create new law.

judge who utters it is expressing her own acceptance of the norm, not simply asserting that it was accepted by members of her community. On this view, (3) is inferred from (2) *because* the judge accepts the rule of recognition described (semantically) and evinced (as a matter of speech act type) in (1).

This appeal to the role of the internal point of view in the utterance of (1) actually serves to make Hart's problem more evident, not to reduce it. The foregoing is an articulation, from a first-person perspective, of how it is that (3) is reached by someone who accepts (2); the person also accepts the proposition that she ascribed to members of her community in (1). But this narrative account is not a reconstruction of the argument used by judges. It is, in effect, an analysis according to which there is merely the appearance of a sound argument. It shows the putative argument to be a hybrid: while (3)–(7) may be sound, (1)–(3) is something of a description of the process of the judge, not a justification of (3). Some philosophers of law might embrace this quasi-justificatory account of judicial warrant, but I think Hart would not and should not be among them. Judges justify, according to Hart, and they also take themselves to be justifying. Moreover, a great contribution of Hart's entire theory is his account of how it is that rules of recognition do justify claims that certain primary norms are valid, even if they do not happen to be accepted from the internal point of view. If Hart's theory of rules of recognition requires an abandonment of the view that judges engage in genuine justification of their legal conclusions, then it would clearly be regarded by Hart himself as requiring repair.

Interestingly, I do not think that the response anticipated above best captures what Hart says in *The Concept of Law*. Indeed, he seemed to have resisted the suggestion (by Dworkin) that rule-of-recognition statements were internal statements. As discussed above, his prototypes of 'internal statements' were actually of primary legal rules, not secondary legal rules.[57] And he defined 'internal statements' as ones uttered, from the internal point of view, by speakers who tacitly accepted a rule of recognition.[58] This definition, while of course not eliminating the possibility that rule-of-recognition statements would be made by a person who accepted them, and made from the internal point of view, seems to exclude rule-of-recognition statements from possibly satisfying the definition of an 'internal statement'.

A more textually grounded response to the argument I have offered would deny that the argument is true to the nature of judicial (or lawyerly) justification. Hart suggests in *The Concept of Law* that express justification typically begins with recognition of primary legal norms, as

[57] *CL*. at 102–3. [58] *Id*. at 102.

in (3); rules of recognition are not, on his view, a normal part of express legal justification by judges, lawyers, or citizens:

> In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule; though occasionally, courts in England may announce in general terms the relative place of one criterion of law in relation to another, as when they assert the supremacy of Acts of Parliament over other sources or suggested source of law. For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers. . . . *The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view.*[59]

Hence, it might be replied by Hart, an account of legal justification need not render the inference from (1)–(3) sound, because such inferences are not part of legal justification, except on rare occasions.

There are two serious problems with this response. The first is that, at least in the American legal system, Hart's characterization of reference to the rule of recognition as 'rare' is inaccurate. Explicit use of rules governing validity of putative legal norms is common in the United States. This is not simply because our system involves an elaborate written federal constitution which both articulates conditions of legal validity and creates legal enigmas with regard to validity. The point goes beyond anything dependent on American constitutionalism. Courts are frequently called upon to decide the force and applicability of holdings from other courts, the interrelation between federal and state law, state and local law, international and national law, and between different branches of government. These requirements—many of which apply even to non-federalist, and non-constitutional systems—are quite pervasive. Even if the run-of-the-mill case does not expressly involve such issues—and I am inclined to agree with Hart that it does not—the characterization of such references as 'very seldom' is not tenable today. This point is elaborated in Part V(B).

The second problem is more fundamental than the first. Whether an adequate account of the role of rules of recognition in justification is necessary does not turn on whether the rule of recognition figures explicitly or implicitly in justification. If it figures in justification either way, then an account of its logical form that permits us to see why it can figure non-fallaciously in the justification is required. As the italicized passage above indicates, Hart himself asserts that rules of recognition figure implicitly in legal justification. He therefore needs an account that explains why they in fact license inferences such as the one from (1)–(3). The view that rule-of-recognition statements are social fact statements does not produce this.

[59] *Id.* at 101–2 (emphasis added).

It will not do to respond that Hart treated rules of recognition as tacit heuristic devices, not as implicit components of justification. In the first place, a 'mere heuristic device' view of rules of recognition is alien to the text of *The Concept of Law*. Second, as the passage above suggests, Hart believed that rule-of-recognition justifications could, as it were, be pressed for, and if so, could sometimes be produced. Such a view contemplates a foundational epistemic role for rules of recognition, which may be difficult to put into words; it plainly does not contemplate that they merely serve as heuristic devices. Third, it is part of the explanatory power that Hart fairly claims for his entire theory that he can account for why it is that some statements are valid and others are not; at least it is part of his enterprise to explain why those who occupy the internal point of view may rightly regard themselves as being justified in counting some norms as valid and others not. This goal clearly requires seeing rule-of-recognition statements as playing a genuine justificatory role, not merely a heuristic one.

A third Hartian response might be to reconstruct the argument so that the qualifier 'under the rule accepted as a social rule by judges in the American legal community' follows through, nearly to the end of the argument, e.g.:

(6′) Under the rule accepted as a social rule by judges in the American legal community, Jones shall be fined $100.

Then, note that we would need a premise such as:

(6a) I shall adjudicate according to the rule accepted as a social rule by judges in the American legal community.

This would lead to the practical conclusion:

(7) Jones is hereby fined $100.

There are numerous reasons for rejecting this reconstruction. First, as a logical matter, the argument from (3′), (4) , and (5) to (6′) is invalid, because it requires breaking into the logical operators in the embedded imperative of (3′). Second, the need for (6a) makes the argument unusually incomplete (even assuming, contrary to fact, its validity). Premiss (6a) is not true. It is simply the expression of a resolution to act a particular way. It is thus highly misleading to characterize (7) as the conclusion of a sound practical inference. More importantly, the adjudicative conduct of the judge is not justified, on this account. Of course, we might replace (6a) with:

(6b) An American judge ought to adjudicate according to the rule accepted as a social rule among American judges.

And

(6c) I am an American judge.

implying

(6d) I ought to adjudicate according to the rule accepted as a social rule among American judges.

implying (7).

But the problem with this account (in addition to the logical fallacy already mentioned) is that (6b), which is plainly a normative premiss, is quite implausible from a normative point of view. It is brute conventionalism as a normative matter. Moreover, it seems highly implausible that this premiss is part of the justification actually used, i.e. the reconstruction through (6b) fails to capture a plausible account of the sorts of justification actually deployed. Finally, the 'ought' in (6b) is of the wrong sort to capture Hart's view. For insofar as Hart thought judges were obligated to apply rules of recognition, it was critical to his view that the obligation was not a moral obligation to do what every other legal official did, but an obligation having a character potentially distinct from that of moral obligations, existing as part and parcel of the existence of the social rule. The prior argument, travelling through premiss (6b), utterly misses this, deploying a more general form of 'ought' that applies to the output of the rule of recognition as independently derived, rather than existing in virtue of the rule.

An apparently rather different means of responding to this critique might accept the justification of (1)–(7), but add to it at the front end, rather than in the middle or at the end. Thus, perhaps (1) is understood as a secondary legal rule statement, but (1) is justified by:

(0) 'Whatever the legislature has duly enacted by a majority vote is valid law' is a social rule in the American legal community.
(0a) This legal community is the American legal community.
(0b) 'Whatever the legislature has duly enacted by a majority vote is valid law' is a social rule of this legal community.

The statements (0) and (0a) are arguably empirical, and entail (0b), which appears to justify the judge's actual deployment of the rule of recognition as a rule of recognition in (1) through (3).

In fact, however, this argument only highlights the equivocation upon which what I have called the Hartian position seems to rely. For, unless (0b) is merely an emphatic way of announcing (1) *as* a rule of recognition, it is an empirical statement of social fact. If it is that, however, there is no reason to think that it entails a statement about the validity of putative norms, which statement could lead to practical decisions in applying those norms.

Finally, the Postscript itself includes a response to what I have called Dworkin's argument from normativity, and since the argument I have put forward in this section is in some ways modelled after Dworkin's, perhaps Hart's Postscript response to Dworkin will be instructive. Hart

takes Dworkin to be asserting that judges deciding whether to apply a putative legal norm are deciding a normative question—to wit, whether it is their duty to apply the norm. Dworkin takes Hart's theory of social rules to commit him to the view that this normative question about duty is decided by whether or not officials have a social practice that covers the case. Dworkin rejects this view, arguing that the question is not whether, from a sociological point of view, there is such a practice, but whether, from a moral point of view, putative legal norms ought to be treated as law under such circumstances.

Hart appears, in the Postscript, to accept Dworkin's framing of the issue and to hold up the conventionalist side of the debate so framed. He does seem willing to assert that it is a sufficient reason to conclude that there is a judicial duty to apply putative norms with certain attributes as valid law and that there is a social rule of doing so. To this extent, Hart appears to endorse the argument that travels through (6b) above. For the reasons already articulated, that argument is unacceptable.

There is, however, a yet larger problem with the account Hart appeared to accept in the Postscript. That account appears to concede to Dworkin that rules of recognition impose duties. Indeed, this view might be thought to provide, in broad terms, the key to a critique based on the normativity of arguments from rules of recognition. In fact, the discussion of judicial duties does the opposite, for it diverts attention from a pivotally important insight of *The Concept of Law*: judges' decisions to apply certain putative norms as law are themselves applications of shared criteria of validity. This insight lies at the core of Hart's deep-seated conventionalism. Although Dworkin is correct that the model of social facts is incapable of capturing the normativity of legal justification, it is not the morally loaded or obligatory nature of adjudication which presents a problem. As I have argued, it is the *practicality* of adjudication. Dworkin appears to score an easy victory over Hart by drawing him into the view that rules of recognition impose duties, and then depicting the Hartian as holding an untenably conventionalistic account of duty.

Hart, and some Hart scholars, are attracted to the view that rules of recognition are duty-imposing rules. This may seem to follow from the fact that judges have obligations to apply the law and the rule of recognition is a rule that tells them the conditions under which they have such obligations.[60] If that is the source of the view, then it is fallacious. To take an analogy, a teacher examining her students on a state-wide writing examination may have an obligation to penalize students whose essays

[60] This is not necessarily the only motivation for this view. Coleman, for example, in his forthcoming *The Practice of Principle* (2001) adopts a view of rules of recognition as coordinative conventions that arguably provides a different basis for such obligations.

contain grammatical errors. The rule 'All sentences must contain at least one verb' plays a role in specifying which essays contain grammatical errors, and therefore which students there is an obligation to penalize. It would be wrong to infer that the preceding grammatical rule was a duty-imposing rule. Likewise, so far as the theory of rules of recognition as social rules goes, judges' general duty to apply the law may come from a variety of different sources. Rules of recognition play a substantial role in giving content to those duties, but they are not necessarily what imposes the duties in the first place.

The important point of this part does not concern duties or social facts. It concerns criteria of validity. When legal justifications push to the level of rules of recognition—as, for Hart, they may do explicitly—the discourse concerns criteria of validity. The statements of rules of recognition are therefore statements that assert criteria for validity. They are not statements about what legal officials believe or treat as the criteria of validity, but about what such criteria are. It is only because they are this that they are capable of yielding the practical conclusions of applying the law as valid law.

V. THE ARGUMENT FROM CONTESTABILITY

A. Dworkin's disjunctive argument

We are now in a position to see more clearly Dworkin's argument from disagreement, or, as I shall call it, his argument from contestability. As discussed above, Hart interprets Dworkin as casting doubt on the existence of a rule of recognition as a social rule, by pointing out the existence of important disagreements on criteria of validity. Hart responds by stating that it is possible to have an agreed upon rule of recognition, which is a social rule, but which is not determinate on every legal issue, and about which there is disagreement in application. This would, according to Hart, not undercut the existence of a rule or its status as a social rule.

Dworkin had anticipated this move in MOR II, and offered the following disjunctive argument against it.[61] If rules of recognition are treated as convergent social practices, which is what the social rules theory of rules of recognition seems to contend, then *as to aspects of the rule of recognition on which legal officials do not converge in conduct*, the rule of recognition does not exist.[62] The upshot is that the validity of a putative legal norm in a

[61] Dworkin's actual argument is not presented by this name, or in this form, and has components that are neglected here.

[62] *TRS*, at 54–5.

case that turns on a controversial issue of validity is not settled by the rule of recognition. Hence, wherever there is such a controversial issue as to validity, the rule of recognition of the legal community, if there is one, simply does not extend to it. The putative law is not really law under the rule of recognition. If Dworkin is right that such cases are not anomalous but legion—and I think he is—then his objection does substantial damage to the thesis that rules of recognition may be treated purely as convergent social practices.

On the other hand, Dworkin argues, rules of recognition might be treated as particular verbal formulations such as 'Whatever Parliament enacts is law'.[63] Then, while there might be agreement that this is the rule of recognition, there would nevertheless be disagreement over how to interpret this formulation. Yet Dworkin argues forcefully that it is not plausible that all the controversies over validity turn on the interpretation of particular words in a given formulation.[64] He therefore rejects Hart's thesis that it is central to a legal community's existence that it have a rule of recognition that is a social rule.

The disjunctive argument as so presented invites an obvious rejoinder, based upon my reconstruction of Hart's framework for thinking about rules of recognition, in Part III. Dworkin selects two disjuncts for what a rule of recognition is: a practice, or a verbal formulation. As I argued in Part II, there is a third possibility—that a rule of recognition is a proposition; moreover, this third possibility in fact provides the best account of Hart's view. As Hart's response in the Postscript confirms, he did regard rules of recognition as propositions. Hence, he thought there was an accepted proposition or set of propositions whose acceptance as a social rule constituted the legal system's existence in that community. But the acceptance of such a proposition leaves open the question of how it would be applied in a particular case. It is not prima facie implausible that the range of arguments over validity within a sophisticated legal community should be arguments over the application of such a proposition or propositions to various different kinds of issue, though it would be if the claim were that there was a privileged verbal formulation. Conversely, there can be an agreement *that* validity is determined by a particular set of criteria, even if there is not agreement in conduct. The convergence in conduct that constitutes the social rule, as argued in Part III, is *acceptance of a particular proposition or propositions*. The rule of recognition *is* the proposition; it is an important attribute of this proposition that it is a social rule. Once we have clarified that 'proposition' was the kind of thing a rule of recognition was intended to be, it is possible to explain more fully than Hart did in the *Postscript* why Dworkin's disjunctive argument is unsound.

[63] *Id.* at 62. [64] *Id.* at 63.

B. Contesting rule-of-recognition statements

While Dworkin's disjunctive argument in MOR II is adequately met by the claim that rules of recognition are propositions which there is a social rule of accepting, this is only a temporary victory. The more interesting version of Dworkin's argument from disagreement, I suggest, applies precisely when we recognize that rules of recognition must be propositions on Hart's view. For then we are returned to our question of what is the status of statements that assert rules-of-recognition. Hart adhered to the view that rule-of-recognition statements could only be understood as external statements, or as utterances whose propositional content was equivalent to that of an external statement. But if rules of recognition are propositions, and moreover, it is possible to disagree about whether a particular case falls under the rule, then rule-of-recognition statements must, again, be secondary legal rule statements.

The argument from contestability goes one step further, however, for it provides another ground for rejecting the claim that rule-of-recognition statements have social facts as their truth conditions. We must broaden our view of Dworkin's critique of Hart to see why. The argument from disagreement, in MOR II, can be seen as an early, and in some ways less contentious, version of the semantic sting argument in *Law's Empire*.[65] It shares with that argument the premiss that legal officials commonly and appropriately engage in reasoned disagreement with one another over criteria of legal validity, and the conclusion that it is not the case that social facts provide the truth conditions for statements about legal validity. Unlike the semantic sting, it does not purport to criticize positivism as a theory of the meaning of the term 'law'—a contention that Hart has persuasively rebutted in the Postscript.[66] Both arguments are taken by Hart as an argument that the disagreement in question is inconsistent with there being a conventionally accepted rule of recognition.[67] For the reasons that Hart offers, that I have undergirded, and that Professors Coleman, Endicott, Raz, and Marmor have elaborated, the argument so construed is not persuasive.[68]

But the lack of actual agreement in practice, and the internal inconsistency of claiming that a social rule covers a certain issue even where agreement is lacking, is not the most important point in Dworkin's critique. What is important is the possibility of a certain kind of reasoned discourse about whether or not to accept a statement regarding the conditions of validity. In

[65] *Law's Empire*, at 31 ff.

[66] *CL*, at 244–8.

[67] *Id.* at 245–6 (although Hart interprets the semantic sting as putting this objection in semantic terms).

[68] Coleman (this volume); Timothy A. O. Endicott, 'Herbert Hart and the Semantic Sting' (this volume); Marmor, 'Legal Conventionalism'; Raz (this volume).

short, what is important is that disagreements about validity display the possibility of contesting, or arguing over whether particular rule-of-recognition statements are true, and engaging in such argument by providing reasoned legal discourse.[69] This is an argument that rule-of-recognition statements are not social fact statements. For if they were social fact statements, it would not be cogent (as it is) to contest them except by pointing out certain facts about legal officials' practices. Their contestability by appeal to reasons other than social facts demonstrates that the rule-of-recognition statements within judicial discourse are secondary legal rule statements, not social fact statements. More generally, it also shows that truth conditions for these rule-of-recognition statements are not simply social facts.

Hart has suggested, in response, that any reasoned disagreement that purports to be a disagreement about the proposition that is the rule of recognition is actually a disagreement about its application.[70] Indeed, Coleman has argued that the burden is on Dworkin to say why it is that disagreements should always be interpreted as disagreements over the content of the proposition accepted, rather than over its application.[71] As I will elaborate in the next section, and in Part VIII, this seems to me to mis-state the argumentative burden, at least given Dworkin and Coleman's shared holism, and given an epistemic environment in which foundationalism is generally frowned upon. Dworkin need not insist that all disagreements be cast as disagreements about the rule of recognition; he is permitted to maintain that some disagreements are over application, not content. He might simply reject the contention that no disagreements, even those that appear to be about criteria of validity, are really disagreements about which rule-of-recognition statements to accept, but are all disguised applications.[72]

Finally, it is noteworthy that the reconstructed argument from contestability is complementary to the argument from the normativity of rule-of-recognition statements. While the latter argument showed that rule-of-recognition statements must be secondary legal rule statements, because of *the inferences drawn from them*, the argument from contestability

[69] Cf. Arthur Ripstein, 'Law, Language and Interpretation', 46 U. Toronto L. Rev. 335 (1996) (reviewing Andrei Marmor, *Interpretation and Legal Theory* (1996)).

[70] Coleman put forward this position in 'Negative and Positive Positivism', and Dworkin replied to it in 'A Reply by Ronald Dworkin', in *RDCJ*, at 252–4.

[71] Coleman, *supra* n. 16, at 410–12, n. 46.

[72] In his response to Coleman, Dworkin seems to contest the idea of characterizing an apparent disagreement over the content of the Rule of Recognition as a disagreement in application. '[Coleman] says there is a difference between controversy about what the reigning convention, properly understood, really is, and controversy about what follows from the reigning convention, and he seems to think that controversy of the former sort poses a greater problem for law-as-convention. This is a doubtful distinction.' *RDCJ*, at 253.

shows that rule-of-recognition statements must be secondary legal rule statements because of *the reasons offered in their support*.

C. Illustrating the argument from contestability

A recent example will help solidify these conclusions. *Anastasoff* v. *United States*[73] concerns a taxpayer's claim that the United States Internal Revenue Service (IRS) wrongfully refused a claim for a tax refund on the ground that it was received late. The substantive issue was whether a 'savings' provision in the Tax Code, expressly permitting claims that were not timely received under a certain statute to be dated according to their postmark, would figure into the calculation of the time between the original overpayment and the filing of the refund claim. The District Court sided with the IRS, and the taxpayer appealed to the United States Court of Appeals for the Eighth Circuit.

On appeal, the Eighth Circuit Court of Appeals noted that it had already decided this precise issue in an unpublished opinion, *Christie* v. *United States*.[74] The plaintiff argued that, under Eighth Circuit Rule 28A(i), '[u]npublished opinions are not precedent'. The court held, however, that unpublished opinions are precedent, and followed *Christie*. It held that Rule 28A(i) exceeded the judiciary's power to depart from precedent, under Article III of the US Constitution.[75] In broad terms, the court reasoned that the doctrine of precedent was inherent in the power of federal courts as vested in them by Article III, and that therefore courts were not at liberty to depart from precedent in the manner that Rule 28(A) purports to license them to do. Judge Richard Arnold, the eminent Eighth Circuit judge deciding the case, drew upon important Supreme Court decisions and historical considerations regarding the framers' understanding of the federal courts, as well as broader concerns relating both to courts' power and to the importance of stability.

Anastasoff illustrates several important features of the argument from contestability. First, what was at issue in this case was whether to accept or reject a particular secondary legal rule statement: 'unpublished opinions of the Eighth Circuit are not precedent.' The judges in *Anastasoff* did not decide whether to accept this statement simply by looking at what other judges did. They began by looking at another legal norm, a rule that the Court had laid down itself. The deeper issue then became whether to reject or accept a closely related secondary legal rule statement: 'A federal court of appeals has the power to lay down a rule that has the effect of

[73] 223 F.3d 898 (8th Cir.), vacated on other grounds, 235 F.3d 1054 (8th Cir. 2000) (en banc).
[74] 91–2375MN (8th Cir. Mar. 20 1992) (per curiam) (unpublished decision).
[75] US Const. Art. III. § 1, cl. 1.

empowering itself, on occasion, to issue decisions that will not have precedential effect.'

The core of the argument from contestability is that statements like those above are contestable, and not simply by reference to social facts. It is not simply a matter of whether other judges or courts accept this statement. In fact, *Anastasoff* is quite a remarkable example of the contrary, for Eighth Circuit judges did in fact have a practice of treating unpublished opinions as lacking precedential force. More generally, federal judges across the nation have a similar practice, and have the related practice of applying Circuit Court Rules that designate unpublished opinions as lacking precedential force. Nevertheless, the judges' question in *Anastasoff*; 'do unpublished opinions have precedential force'?, and more specifically, 'do courts have the power to designate categories that lack precedential force?', are perfectly cogent questions for the court to ask. Moreover, there are arguments to be mustered on both sides of this issue, and these arguments are continuous with legal argument more generally. They involve the deployment of precedent, of constitutional provisions, of principles of law respected by the court, and also, perhaps, of considerations of practicality. All of these arguments are offered to support (or rebut) the rule-of-recognition statement that unpublished decisions are precedent. What this shows is that the rule-of-recognition statement does not take as its truth conditions simply social facts.

It is tempting to think that *Anastasoff* belongs to the class of American cases that present a peculiar strength for Dworkin and weakness for Hart—the constitutional cases. Indeed, the case is decided under Article III of the US Constitution. It might be argued that the real rule of recognition, here, is the US Constitution, and that it is only because there is a social fact of agreement that the Constitution (and in particular Article III) is the rule of recognition that certain other secondary legal rule statements are accepted or rejected. The disagreement, on this view, is simply a disagreement as to application of an agreed rule of recognition. As discussed above, this is the thrust of Hart's response to the argument from disagreement in the Postscript.

This argument is unpersuasive in *Anastasoff* and more generally. It is unpersuasive in *Anastasoff* because Article III does virtually no work in the court's decision. Article III, § 1, clause 1 states only: 'The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'[76] The Eighth Circuit used it as a shell into which its decision might be poured. It contains within it no standard whose application is the nub of the dispute. The reasons cited by the court are extrinsic to the

[76] *Id.*

pertinent text of Article III, and to the substance of the supposedly agreed rule. Hence, to treat *Anastasoff* as a case of an agreed rule with a disagreement in application would be to engage in the sort of dogmatism that the holist and pragmatist makes it a point to reject.

Returning to the earlier point, it would be a mistake to try to explain away *Anastasoff* as an exceptional case, merely illustrating the complexities that American constitutionalism introduces into our legal system. The case does not turn on the divisive questions of political morality that understandably tempt Dworkin's critics to wonder whether his points in constitutional interpretation genuinely carry over into jurisprudence more broadly. Indeed, similar questions can and do arise within state courts, concerning which decisions of which courts are to be regarded as precedents. These questions are asked and answered as difficult legal questions. They are debated and decided by reference to statutes, rules, precedents, principles, and a variety of other considerations, whether or not they nominally contain constitutional issues. They include, for example, questions about choice of law, the bindingness of federal appellate decisions in state courts, the precedential forces of decisions putatively vacated pursuant to settlement agreements, and the status of law that purports to be retroactive on certain issues. Such issues are, of course, the stuff of whole areas of law. The point is not that we do not have settled law on such questions. It is that statements of law as to these issues are at least in principle contestable by reference to matters other than social fact. Conversely, to the extent that such statements are true, it is not simply by virtue of social fact.

VI. REJECTING THE MODEL OF SOCIAL FACTS

The argument I have offered thus far has had five parts. First, I attributed to Hart a view labelled 'the model of social facts', according to which what makes a statement of law true is that the legal norm that it asserts satisfies the conditions set out by some rule of recognition, and social facts obtain in light of which that rule of recognition exists in the legal community in question. Under the model of social facts, the truth of legal statements is a matter of social facts. The model of social facts appears to flow smoothly out of Hart's conventionalism, and to provide a form of positivism in the spirit of Austin, without suffering from its shortcomings.

Second, by way of clarifying Hart's account, and simultaneously setting up my critical account, I argued that Hart's conventionalist view requires treating rules of recognition as propositions, which may or may not have the attribute of being a social rule among the legal officials in a given legal community. The latter determines, for Hart, whether a legal

system with that rule of recognition is the legal system extant in a particular community.

Third, this analysis implied that a statement might, at least in principle, be related to a rule of recognition in at least two different ways. One sort of sentence would express a rule of recognition—this sort would be a subset of secondary legal rule statements. Another sort would assert that a certain proposition that has the form of a rule of recognition was treated in a certain manner by members of a legal community—this sort would be a social fact statement. The first argument against the model of social facts is simply that rule-of-recognition statements appear to be secondary legal rule statements, not social fact statements, yet Hart's model of social facts depends on rule-of-recognition statements having the same truth conditions as social fact statements.

Fourth, I sought to deepen the argument against the model of social facts by developing an argument in the spirit of MOR II. Rule-of-recognition statements are actually or potentially part of legal justifications that culminate in judicial decisions applying law as valid law. These statements could not play the role they do play (or could play) in legal justifications if their truth conditions were provided by social facts.

Fifth, I drew upon Dworkin's arguments in MOR II and elsewhere, pointing out the contestability of rule-of-recognition statements. In particular, judges commonly contest rule-of-recognition statements, but not necessarily simply by reference to social facts. I argue, from this, that rule-of-recognition statements do not simply take social facts as their truth conditions.

If these arguments are sound, then the model of social facts, as I have defined it, must be rejected. We should therefore abandon the view that it is facts about the conduct and attitudes of legal officials that determine whether or not, for example, a certain procedure is sufficient to confer validity on a putatively valid statute. We should therefore, also, abandon the view that whether particular statements about legal norms, rights, and duties are true depends upon the social facts. Whether these legal statements are true depends upon the status and validity of certain other legal norms, and this is not simply a matter of social fact.

Nothing I have said, however, is intended to undercut Hart's conventionalism in the form set out in Part III. None of it provides grounds for rejecting the claim that for a legal system to exist in a particular community is for legal officials to have certain social rules, or conventions, of accepting certain propositions about validity as controlling. Indeed, the correctness of this conventional view was part of the argument against the model of social facts. For when we see that the conditions of being extant require that legal officials *accept* certain secondary legal rules and act in accordance with them, and when we see that those secondary legal rules

are themselves propositional entities, *we also see that* the statements of such rules assert propositions, rather than describing conduct.

VII. HART ON DESCRIPTIVE JURISPRUDENCE

In order to evaluate the effect of the foregoing arguments against the social facts thesis on Hart's overall jurisprudence, it is important to ascertain in what sense he genuinely adopted a social facts thesis. Doing so requires developing an understanding of what motivated Hart's adoption of such a thesis, how it fitted with the theoretical enterprise he took himself to be engaged in. Indeed, when we properly characterize Hart's own central project in *The Concept of Law*, we will see that the foregoing critique of the social facts thesis is consistent with that project.

One possible motivation for adopting a social facts thesis is political. Plainly, a broad strand of positivistic jurisprudence from Hobbes through to Bentham and Austin takes *law* to provide a solution to a global, as well as a series of local practical problems in societies of conflicting desires and opinions. Where both desire and moral discourse can lead to conflict, a legal system overseen by judges might be able to avoid some of that conflict. But it cannot do so if the existence and content of law is incapable of being discerned without the deployment of judgments that are themselves contentious in the same manner that moral discourse is.[77] A system in which what the law is is simply a matter of social and historical fact would avoid this problem, it might be argued, and retain public order. Hence, we have normative reasons, stemming from political theory, to embrace a social facts thesis. On this view, the social facts thesis is a broadening of an Austinian thesis about the provenance of legal norms. In MOR I (repeated in MOR II), Dworkin seems to intimate that Hart was motivated by Austinian concerns such as the foregoing, and he seemed to suggest that the notion of social facts constituting the law was linked to a concept of *pedigree*, which was Austinian in the sense mentioned.[78]

Second, and closely related, there is a conceptualistic as opposed to a political reason for adopting the social facts thesis, one which builds upon the problem of conflict noted above. On this view, it is not only a salutary feature of law that it can resolve such disputes. It is actually an essential feature of what makes the law *authoritative*, and what makes the law *law*, that it is capable of doing so. Hence, the existence of criteria for validity

[77] Cf. Jeremy Waldron, 'Kant's Legal Positivism', 109 Harv. L. Rev. 1535, 1538–41 (1996).

[78] *TRS*, at 17–19 (depicting Austin as explaining how law establishes public order with pedigree criterion, and portraying Hart as repairing defects in the Austinian model, while retaining a core of positivism).

that are discernible without recourse to moral judgment is not simply appealing or correct as a matter of political morality. It is built into the concept of law itself. This is, in rough form, Raz's view.[79]

A third sort of motivation might be called 'metaphysical'. On this view, law is like numbers and goodness and beauty and meaning and mind—it is a thorn in the side of the hard-headed twentieth-century philosopher. It is undeniable that there is some sense in which we have law, but there is no obvious way that law or legal validity fits into the fabric of the universe. To a naturalist or near-naturalist, divine law or Thomistic natural law are clearly unacceptable. Yet behaviouristic accounts are highly implausible. However, if the category of *social facts* is broadly enough construed, and a sufficiently rich practice theory is articulated, it might be possible to find a way of making law metaphysically modest and philosophically safe.[80]

Fourth, and related to the third, is a semantic problem about the term 'law'. One might find it puzzling that we have a practice of asserting that certain putative norms are 'law' (and accepting such assertions). Lawyers, judges, and others seem to grasp this practice. Yet it is arguably unclear what 'law' means. A social facts thesis promises to explain how the predicate 'is law' could be meaningful; there are certain social facts whose obtaining makes something law, we grasp the centripetal force of these criteria, and we are therefore able to retain command of the term. Because this command is shared, 'is law' is part of our shared language.

We have, then, at least four possible sorts of motivation for adopting a social facts thesis: political, conceptual, metaphysical, and semantic. Interestingly, the Postscript casts doubt on all four of these reasons. To begin with, Hart's embrace of inclusive legal positivism directly undercuts both the political and the conceptual motivations. Since he believes that a

[79] See e.g. Joseph Raz, 'Authority, Law and Morality', in *Ethics in the Public Domain* (1994). Note that, in presenting this argument and the prior one, I have not carefully distinguished between a social facts thesis and a sources thesis. Arguably, one might take a sources thesis motivated by either of these arguments to indicate a receptiveness to a similar argument for a social facts thesis. I think the distinction, in this context (and others) is considerably more important than this would indicate. Conversely, my rejection of the social facts thesis does not entail a rejection of a sources thesis. Nevertheless, as a historical matter, the foregoing arguments have motivated both a sources thesis and a social facts thesis, in some philosophers. Anthony Sebok is an example of a contemporary positivist whose primary concern is neither the separation thesis nor the social facts thesis but the sources thesis. See Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (1998).

[80] I suggest in 'Legal Coherentism' 50 SMU L. Rev. 1679 (1997), 1689–94, that several twentieth-century movements in jurisprudence, including positivism, can fruitfully be understood as stemming from the same philosophical motivations that led to revisionist views in philosophy of mathematics, ethics, and aesthetics. Raz's comments on Hart's early aspirations for the potential of Austinian speech act theory to render the objectivity of law consistent with some form of naturalism are highly illuminating. See Raz, *supra* n. 68.

system with a rule of recognition that utilizes moral criteria could, in principle, have laws (and have laws by virtue of certain primary norms satisfying moral criteria), he plainly does not share Raz's belief in the incompatibility of the concept of law and the contestability of the criteria used to decide the validity of a putative law. As to the political argument, it is defective as an interpretation of Hart for the same reason and others. First, an inclusive positivistic system runs into the same difficulty as a system would if its rule of recognition were not discernible as a matter of social fact, for at the end of the day what the law is cannot be decided without recourse to moral argumentation. Hence, if Hart had been advancing a social facts thesis for political reasons, he would not have supported inclusive legal positivism. Moreover, it is plain from *The Concept of Law* that, however conscious Hart may sometimes have been about the value of agreed rules and standards, he never elevated that observation into a politically motivated criterion for law.[81]

Hart's embrace of inclusive legal positivism also diminishes the plausibility of the 'metaphysical motivation', although I shall later argue that this account retains some force. The problem is that the metaphysical status of law is no more secure than the weakest aspect of it. Therefore, if validity turns on moral criteria, then even if it is social facts that make validity turn on moral criteria, states of affairs concerning legal validity are ultimately on no firmer footing than moral states of affairs (or 'normative states of affairs') more generally. While Hart tellingly besmirches Dworkin's reference to 'normative states of affairs'[82]—suggesting a considerable level of metaphysical discomfort of the sort hypothesized—he does suggest that the central theory of the concept of law retains its vitality even if conjoined with inclusivism. More generally, it is worth noting that Hart says nothing in *The Concept of Law* limiting the content of predicates that go into the rule of recognition, thereby not only letting in inclusive legal positivism but undercutting the suggestions entertained above that the social facts thesis is adopted out of a motivation to limit the law to what is discernible, uncontestable, and metaphysically unproblematic. Finally, note that Hart's principal adversary in the Postscript is Dworkin, yet Dworkin's metaphysical baggage would seem to be equal to that of inclusive positivism: social practices and morality.

The fourth 'motivation' is not so quickly undercut by inclusive legal positivism; it is more in tune with Hart's evident interest in language and semantics in *The Concept of Law*, and is quite consistent with the prevailing winds of the ordinary language philosophy that dominated Oxford

[81] Liam Murphy, 'The Political Question of the Concept of Law' offers an entirely different 'political' reading of Hart's jurisprudential motivation (this volume).

[82] *CL*, at 256–7.

and Hart's environment when he wrote *The Concept of Law*. The hypothesis that this is what led Hart to the social facts thesis was attractive enough to lead Dworkin near it in his famous chapter on the 'semantic sting' in *Law's Empire*. Unfortunately, there is little in *The Concept of Law* or Hart's other writing to bear out this interpretive hypothesis. Indeed, as mentioned above, Hart's Postscript soundly and persuasively rejects the semantical motivation and position that Dworkin attributes to him, as do the articles by Endicott and Raz in this volume.[83]

Why, then, does Hart insist on saying that what the law is is constituted by social facts? Like Rick in *Casablanca*, Hart is 'saying it because it's true'. He does not begin with the aim of showing that law is *exclusively* a matter of social fact. Rather, he begins with the observation that law is a profoundly *institutional* matter to which social practices (and facts about those practices) are plainly of enormous importance. The goal in *The Concept of Law* is more constructive than defensive. It is to explain the sense in which social practices are constitutive of certain aspects of law. Connectedly, it is to demystify certain legal concepts by understanding the way they are enmeshed within these social practices. Above all, however, it is to begin to explain the variety and the complexity of legal concepts in a manner that is modest and illuminating. For Hart, this largely meant doing so in terms of social practices, and, relatedly, facts about social practices.

Hart is straightforward and forceful about the centrality of these aims in the first paragraphs of his substantive discussion in the Postscript, on the nature of legal theory:

> My aim in this book was to provide a theory of what law is which is both general and descriptive. It is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect. This institution, in spite of many variations in different cultures and in different times, has taken the same general form and structure, though many misunderstandings and obscuring myths, calling for clarification, have clustered round it. . . . My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.[84]

Hart goes on to recognize that Dworkin conceives legal theory as 'in part evaluative and justificatory and as "addressed to a particular legal culture" '.[85] He does not criticize legal theory as Dworkin has conceived

[83] *See supra* n. 68 and accompanying text.
[84] *CL*, at 239–40.
[85] *Id.* at 240 (quoting *Law's Empire*, at 102).

it; indeed, he recognizes the importance of this evaluative enterprise. However, he firmly asserts that the existence and importance of the evaluative enterprise in legal theory in no way undercuts the importance of the general and descriptive enterprise that he has sketched out, and within which he produced *The Concept of Law*. To think otherwise is to endorse what Dworkin himself has now described as a form of 'imperialist' claim.[86] It is particularly significant that Hart puts forward his *descriptive* picture of legal theory in explaining why it is that he has analysed concepts such as 'rules of recognition', 'acceptance of rules', 'internal and external points of view', 'internal and external statements', and 'legal validity'. Indeed, he characterizes his use of these concepts as 'a means of carrying out this descriptive enterprise'.[87]

It is misleading to suggest that Hart's aims are merely descriptive and constructive, and not defensive, metaphysical, semantic, or political. In at least one respect, it is all of these. For as Hart himself says, those who have preceded him—such as Holmes and Austin—have deployed their own characterizations of the nature of law and legal institutions in such a manner as to claim that certain metaphysical, semantical, moral, and political conclusions follow. In offering a constructive theory of law and of the concept of law, Hart is deliberately and explicitly warning us against reaching those conclusions on the basis of his predecessors' faulty accounts of law.[88] In this sense, *The Concept of Law* is of a piece with the work of J. L. Austin and the later Wittgenstein.[89] Its aim is to deal with conceptual and philosophical difficulties by offering more sensitive and nuanced accounts of the manner in which certain kinds of concepts are embedded in social practice. The effort is not to reduce or replace current concepts. Nor is the effort necessarily to establish a naturalistic framework. It is to remain methodologically modest, in terms of the kinds of ontological resource employed in an account, while nevertheless capturing as much of the conceptual and social phenomena as one can. The aspiration is to understand and explain these phenomena. On a more defensive front, it is to wash away the errors of those who have paid insufficient attention to the language, the concepts, and the practices, and who, in so doing, have generated metaphysically bloated or conceptually

[86] *CL*, at 243 (quoting R. M. Dworkin, 'Legal Theory and the Problem of Sense', in *Issues in Contemporary Legal Philosophy: the Influence of H. L. A. Hart*, ed. R. Gavison (1987), 19).

[87] *CL*, at 240.

[88] *Id.* at 239–40: 'This institution [law] . . . has taken the same general form and structure, though many misunderstandings and obscuring myths, calling for clarification, have clustered round it. . . . My account is *descriptive* in that it is morally neutral and has no justificatory aims; . . . though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.'

[89] Cf. MacCormick, *supra* n. 45, at 12–19 (discussing effect of Austin, Ryle, and Wittgenstein on Hart); Raz, *supra* n. 68 (discussing effect of Austin on Hart).

impoverished accounts of central concepts in the relevant area of discourse.[90]

The obvious question, now, is whether the critique of the model of social facts that I have offered really undercuts the model of social facts as Hart himself intended it. I think the answer must be mixed. On the one hand, there is little question that Hart took the distinction between internal statements and external statements to be a highly significant aspect of his theory; he took rules of recognition to be ultimate; and he took it to be the case that the only sense in which a rule of recognition could be said to exist was that it was in fact accepted. This conjunction of positions left him in the position of contending that answers to questions about the validity of legal norms were a matter of social fact. I have argued that on this claim, Hart was mistaken. A rule-of-recognition statement is a secondary legal rule statement, and its truth or falsity is not simply a matter of whether certain social facts obtain, but rather a matter of whether legal validity does turn on what the statement asserts it turns on. The latter is determined in the context of the web of legal statements that justify it, as any other legal statement is evaluated. Hence, the semantics of rule-of-recognition statements to which Hart appears committed—insofar as he appears committed to any—is false. And the suggestion that a rule of recognition's being so can only be, ultimately, a social fact is also false. To this extent, Hart's model of social facts must be rejected.

On the other hand, the account I have offered of both the content of Hart's views and his aims in offering it suggest that the central features of his view can remain intact. Nothing I have said undercuts the view that, in a legal community, officials accept certain propositions about validity, and that it is by virtue of their doing so that those propositions are in force in that legal community. Nothing has undercut the idea of saying that for a legal system to be the legal system of a community is for such secondary legal rules to be accepted by legal officials in the community, in the conventional manner Hart suggests. Indeed, the framework I have offered for thinking about the relation between legal systems and law provides a systematic way to make those points, and to keep clear on the sense in which a rule of recognition is a social rule. Just as late twentieth-century philosophers of language have offered illuminating explanations of how members of a community are able to constitute *meaning* through a certain kind of shared practice,[91] so Hart has explained, through his social

[90] A particularly striking example of where Hart believed he had done this was in his refutation of Austin on obligation and Holmes on the predictive theory of what it means to say that a rule is valid. *CL*, at 104–5.

[91] Whether Hart's theory could be reconstructed along the lines of Lewis's conventions theory of language (and whether it would be desirable to do so) is a delicate issue, as the debate in this volume between Coleman and Marmor indirectly indicates. The more histor-

rules theory, how members of a legal community are able to constitute validity through a certain kind of shared practice. Insofar as Hart's model of social facts is a form of conventionalism—an account of how shared practice of treating a certain kind of rule in a certain manner permits a legal system to exist in a community—it remains a great, and viable, contribution to legal theory. As I have argued, nothing in this theory entails that the truth conditions of secondary legal norm statements are provided by social facts.

VIII. TOWARD COHERENTISM IN LAW

The critique of the model of social facts relied upon arguments against a certain picture of what made legal statements true.[92] A natural question that arises is therefore how to analyse secondary legal rule statements that are rule-of-recognition statements if (a) they are not merely external statements; (b) they are not utterances with the propositional content of external statements that express acceptance of the rule-of-recognition in question; (c) they are not Dworkinian statements of moral duty. I will not attempt to give a complete answer or defence of my answer to this question; however, at least a sketch of an alternate position is in order.

The approach I have elsewhere labelled 'legal coherentism'[93] analyses legal statements generally in a manner that follows a broader programme of coherentism and anti-foundationalism in epistemology, minimalism or at least anti-representationalism in the theory of truth, and holism in the theory of meaning.[94] It is easy to specify the truth condition of a rule-of-recognition statement such as 'a law is valid only if passed by a majority of the legislature'. It is true iff a law is valid only if passed by a majority of the legislature. The same is done for each legal sentence, including rule-of-recognition sentences. We can assert these truth sentences and say that they are true (or false) without needing any explanatory theory. Minimalists like Paul Horwich treat the words 'is true' and like phrases as simply

ically accurate and broader point is simply that there is a range of accounts of meaning that rely on social practices, and these are on a spectrum, from the unsystematic and perhaps anti-theoretical account in Wittgenstein's *Philosophical Investigations* to the game-theoretic account of Lewis in *Convention*. Hart's own account of law, like (e.g.) Searle's account of language, is not at either end of this spectrum, but lies between.

[92] Dennis Patterson has rightly called attention to the extent Dworkin's work displays a concern for providing an adequate semantics for legal statements. Dennis Patterson, *Law and Truth* (1996), 8 quoting Dworkin, Introduction to *Philosophy of Law*, ed. Dworkin (1977), 8–9: 'There can be no effective reply to the positivist's anti-realist theory of meaning in law, however, unless an alternative theory of propositions of law is produced.'

[93] Zipursky, *supra* n. 80.

[94] See *id.* 1695–1707.

devices for expressing the content of the underlying sentence itself.[95]

The minimalist about truth still, of course, faces many questions, and indeed Hart's own philosophical theory of law was not motivated by an attempt to capture the use of 'truth' or 'is true' as applied to legal statements. We will still need an account of how legal statements are justified and what they mean. Hart's answer on justification was clear, and a replacement bears a significant burden. Hart explained that primary rule claims (and, indeed, non-rule-of-recognition claims) were ultimately justified by a rule of recognition. The rule of recognition is the assumed starting point. The evaluation of any other legal claim was made, in part, by implicitly or explicitly applying a rule of recognition as a standard. The rule of recognition is simply assumed; it could not itself be justified. In this sense, Hart regarded the rule of recognition as 'ultimate'.[96]

The legal coherentist shares much with Hart's treatment of discourse over the validity of primary rules. An assertion that a primary rule exists as valid law is typically justified by appeal to statements that express the criteria of validity of such law. That is why, as Hart argued, the status of any particular norm as a law does not depend on its being taken to have the force of law by the members of the community. However, as I argued in Part V, Hart was mistaken in treating rule-of-recognition statements as incontestable. Indeed, Hart's argument contains a non sequitur. He explains that primary rule statements are justified by appeal to other statements that express criteria of validity, and that those statements may themselves be defended by appeal to more basic statements expressing validity. Even if we assume, with Hart, that there must therefore be statements expressing criteria of validity that are not less fundamental than any other statement (i.e. that there cannot be an infinite regress), it would not follow that such statements were not justifiable by appeal to any other statement. This confuses the epistemic order of justification with the legal order of validation. The argument for an ultimate criterion of validity, within a legal system, does not show that there is any statement that cannot itself be justified; it shows (at most) that there is some rule that cannot be validated.

These comments highlight what Dworkin claims is apparent from the nature of legal discourse, education, and practice, as well as adjudication. Legal arguments run in all directions. Frequently, lawyers and judges are called upon to justify claims about high-order rules of validity. In assessing these they bring to bear a variety of claims, of which the most important are often nearly incontrovertible claims about the validity of particular primary rules. The claims to validity of particular rules, or decisions, or other legal norms is often much more epistemically solid

[95] Paul Horwich, *Truth* (1990). [96] *CL*, at 107.

than the claims to validity of broad propositions concerning the criteria of validity of norms. This is not to say that these primary rule statements are incontestable; they, too, are contestable, and can be justified, and must be capable of justification. As a contemporary coherentist like Robert Brandom might put it, to know the law, and to know how to justify claims of law, is to have the kind of mastery that enables one to justify claims at all these levels, and to evaluate such claims to assess whether they are justifiable.

In the decades leading up to Hart's publication of *The Concept of Law*, the suggestion that justification could run 'in all directions' would have met with considerable resistance, at least if the suggestion were intended to characterize some area as a genuine body of knowledge. Knowledge required a foundation, according to the prevailing view, and justifications proceeded from that foundation upwards. Just as logical positivists surmounted the lack of an apparent foundation in semantics or mathematics by selecting assumptions or postulates and constructed a system of justification upon them, so Hart (like Kelsen) constructed legal justifications upon an assumed ultimate criterion of law, a rule of recognition. In law, as in semantics, it also seemed possible to produce a descriptive analysis of the status of that criterion within a particular community.

This is not the place to recount the reasons put forward by Wittgenstein, Quine, Sellars, Rorty, and others for rejecting both positivism and foundationalism, nor is it my intention to evaluate any of these arguments.[97] What it is fair to say, however, is that coherentist approaches to epistemology, which eschew both postulated foundations and empirical ones, have now been well enough defended that, far from being intrinsically suspicious, there are well-recognized general philosophical reasons for thinking such approaches are, at the very least, promising and legitimate.[98] Moreover, coherentist approaches in epistemology have been applied to a variety of domains, which, in the philosophical culture out of which *The Concept of Law* was born, were deemed particularly suspicious; ethics, morality, and aesthetics being examples. Rawls's reflective equilibrium is a form of coherentism, and more generally Davidson, Putnam, and McDowell have embraced what can fairly be characterized as forms of coherentism across the board, specifically including ethics and morality.

Of course, a list of eminent philosophers in other areas who adopt views that loosely fall under an anti-representationalist, anti-foundationalist rubric of 'coherentism' hardly makes for a view in jurisprudence. The

[97] See Zipursky, *supra* n. 80, at 1695–1705.

[98] See e.g. Donald Davidson, 'A Coherence Theory of Truth and Knowledge', in *Truth and Interpretations: Perspectives on the Philosophy of Donald Davidson*, ed. Ernest Lepore (1986).

question arises what these sorts of view might look like applied to the philosophy of law. Fortunately, one does not need to begin at square one on this question, for Dworkin's own jurisprudential views bear a number of strong affinities to the aforementioned views. Indeed, in light of this backdrop of well-known intellectual history, it is somewhat surprising that greater attention has not been directed towards Dworkin's coherentism, in evaluating his thought in relation to Hart. While the role of coherence in Dworkin's jurisprudence is by now a well-worn subject, this has been treated almost entirely as a topic within the theory of law proper, rather than within the semantics and epistemology of law.[99] Yet Dworkin's work has displayed a marked attachment to coherentist thinking both in the theory of truth and in the theory of knowledge. He has repeatedly displayed a similar penchant for deflationary attacks on metaphysical realism, in his arguments from the distinction between internal and external scepticism (as applied to morality). The central thrust of the argument in a his 1996 article 'Objectivity and Truth: You'd Better Believe It!'[100] is that it is a mistake to infer that the statement that a metaphysical or metalinguistic expression such as 'The statement "slavery is wrong" captures reality' or 'The statement "slavery is wrong" is true' is actually asserting anything different from the content of the first-order sentence itself, i.e. that slavery is wrong. From this, Dworkin argues that there is no cogent position for the external sceptic to be rejecting. The external sceptic is therefore nothing other than the internal sceptic, a figure with whom Dworkin is prepared to argue at the first-order level.

The aforementioned argument, whether or not successful in its stated aim of showing that no form of external scepticism can be articulated, is interesting in what it reveals about Dworkin's view of the modesty of truth claims. He evidently takes a deflationary approach toward what it means to say that some statement 'is true'. More importantly, he is characteristically forceful in maintaining that this is the only cogent view to take toward truth sentences in question, or the 'reality' sentences in question. While the article in question principally concerns moral and ethical discourse, its structure and theme hark back implicitly and explicitly to Dworkin's critique of external scepticism as to claims of legal interpretation, in *Law's Empire*.

There is obviously an argument to be made that Dworkin is a coherentist as to the justifiability of legal claims. This is not simply because the arguments from internal and external scepticism are a thinly veiled version of Neurath's boat. Indeed, *Law's Empire*, building upon 'Hard

[99] See e.g. Kenneth Kress, 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions', 72 Cal. L. Rev. 369 (1984).

[100] *Phil and Pub. Aff.* 25 (2) (Spring 1996), 87–139.

Cases', has as one its central theses that the justifiability of a claim about what the law is, in a particular case, *cannot in principle be decided except by taking it as part of a grand theory of all the law.* Dworkin's holism is closely connected to a form of coherentism, insofar as the former springs from a rejection of legal truth as correspondence between legal statement and identifiable (pedigreed) legal norm. Justifiability turns not on the quality of the established match between sentence and legal norms (though fit is obviously a constraint), but on the degree to which the statements within the entire legal theory cohere as a whole which best satisfies the relevant overall epistemic desiderata—for Dworkin, fit and justification.

If these observations have any merit, then there is reason for at least some optimism about the possibility of a coherentist theory in law. Let us return to the question which brought us here: the status of rule-of-recognition statements, if understood as secondary legal rule statements. What makes a rule of recognition statement such as 'A statute passed by a majority of Congress is valid law' true is that it is so—that a statute passed by a majority of Congress is valid law. Truth adds nothing, and cuts no ice. As to justifiability, the statement is justified by a variety of statements, the same statements that a person who had mastery of the law would use to justify it. Insofar as the statement is used to justify primary legal rule statements, nothing in the account needs to change from Hart's. It is simply that the justification can go in more than one direction.

IX. DWORKIN REVISITED

The critique offered in Parts II–VII was in some ways derived from Dworkin's critique of Hart in MOR II. Combining it with the suggestion in the preceding part that Dworkin's views display a form of coherentism provides a different (but by no means complete) picture of one of Dworkin's lines of attack on Hart. It is also significant, I hope, for what it shows about the possibilities of holding a position that in numerous important respects is Dworkinian.

First, the critique does not rely upon any premisses regarding the central place of moral considerations in the law or legal discourse. To be sure, the account I have offered is committed to its being the case that secondary legal rule statements express propositions about the conditions of *validity* of putative legal norms, and license inferences that certain putative legal norms are valid. Moreover, these inferences are not just linguistic but practical, on the account I have constructed. Judges apply certain norms as valid law as inferences from secondary legal rule statements (and other premisses). To this extent, rule-of-recognition statements are practical and conduct-guiding. It is appropriate, for these reasons, and

also because of the nature of the concept of *validity*, to describe secondary legal rule statements on the account I have offered as 'normative'. To this extent, it does not do violence to language to call them 'normative rules', as Dworkin appears to do in MOR II. However, it does not follow that secondary legal rule statements are statements about moral duties, or even that they license inferences about moral duties. Indeed, to the extent that they license inferences about what judges have duties to do, this may well be because of the plausibility of a background principle that judges have prima facie moral duties to apply the (valid) law.

Indeed, Dworkin's coherentism does not rely upon, but rather supports, his arguments for the role of morality in law. For while it is not the possibility of moral justification that drives the argument, the argument renders it coherent to offer a moral consideration as a reason for or against a secondary legal rule statement. Legal justifications are put forward as overall theories with a variety of statements within them. As Dworkin forcefully argued in MOR I and subsequently in several articles and books, moral statements are among those. In this sense, while the observation that judges include such statements in their legal arguments does not in any sense flow from the coherentism I have sketched, the contention that it is permissible for judges to do so, and that the justifiability of a statement about the law will sometimes turn on a moral consideration—these are statements that flow from the capacity of the coherentist model to absorb moral statements into the fabric of legal discourse.

Third, the positive account (though not the critique, more narrowly conceived) draws upon at least some aspects of coherentism in epistemology and the philosophy of language. It deploys a coherentist, as opposed to a foundationalist, account of the justification of legal statements. A foundationalist would model the justification of primary legal rule statements as proceeding from secondary legal rule statements, which in turn rely for their justification on a rule-of-recognition statement. The foundationalist take the justifiability of each of the higher-up steps to depend on the rule-of-recognition statement. This means that the rule-of-recognition statement must be privileged in some way, or else everything falls through. It also means that the rule-of-recognition statement cannot itself be justified from the less fundamental secondary legal rule statements or from the primary legal rule statements. As is well known, Dworkin's model of legal justification is quite different from this. The justifiability of primary legal rule statements may indeed involve secondary legal rule statements and other sorts of statement, but it does not follow that these must all come to rest on some foundation of legal statements that is itself secure.

Fourth, the positive account so portrayed does also draw upon the

availability of certain coherentist ideas in the theory of truth. At a minimum, a particular robust and metaphysical version of the correspondence theory of truth is rejected by Dworkin and by me, and this rejection plays a significant role in rendering plausible the positive account I have sketched. Part of what renders that plausible is that when we reject the statement that the truth condition for a rule-of-recognition statement is some social fact obtaining, we offer in its place another account of the truth condition of the rule of recognition. Yet this alternative account is quite minimalist, and does not itself purport to carry any heavy metaphysical baggage. In light of the spirit of Dworkin's arguments in MOR II, as well as his express statements in *Law's Empire* and subsequent work, I have argued that secondary legal rule statements and rule-of-recognition statements are capable of figuring in justifications and being true (or false), even if not rendered so by social facts as truth conditions

The prior two points—suggesting a relationship between forms of coherentism in metaphysics and epistemology on the one hand and the embrace of a Dworkinian view of jurisprudence on the other—should not be over-interpreted. I do not mean to suggest that the truth of epistemic anti-foundationalism, as a general view, is a necessary or sufficient condition for the truth of Dworkin's jurisprudential view. A similar qualification applies to coherentist or minimalist truth theories. The point is rather that, once one has come to see these coherentist positions as a cogent and promising way to understand a certain subject area, from an epistemic and semantic point of view, it suggests a cogent and philosophically promising direction in which to build an alternative to the model of social facts within jurisprudence. Given that Dworkin himself appears sympathetic to these epistemic and semantic positions, and has in fact offered an alternative to the model of social facts, the connection between the two ought to be noticed, and merits further attention.

Finally—and perhaps somewhat counterintuitively—I suggest that, once we have rejected the model of social facts, Hart's analysis of law in terms of conventions in a legal community is available not only to Hart but also to Dworkin. For the same reasons that it is wrong for Hart to adopt the model of social facts as a theory of what makes legal statements true, it is wrong for Dworkin to reject Hart's conventionalism as a descriptive analysis of the nature of legal systems. A central contention of this paper is that conventionalism in the analysis of the nature of legal systems does not entail the model of social facts. As to Hart, we used this to show that he should not adopt the model of social facts, even if he was a conventionalist. Dworkin clearly starts from the other end, in his certitude that the model of social facts is mistaken. But his rejection of the model of social facts appears to lead him to a rejection of conventionalism in the analysis of the nature of legal systems. This is simply the other side of the

problem Hart faced: rather than incorrectly inferring the model of social facts from conventionalism, Dworkin is incorrectly inferring the falsity of conventionalism from the falsity of the model of social facts. What I have tried to do is display their separability. As Parts II–VII showed, the risk to be avoided is that, once one embarks on a form of conventionalism in descriptive jurisprudence, one will be tempted to transform this into an account of the truth conditions of legal statements. Dworkin seemed to have something similar in mind when he wrote, 'it is worth stressing how pervasive that question [of sense] is in the issues that general theories, like Hart's, have mainly discussed'.[101] Of course, in his discussion of the semantic sting, and to a lesser extent in the MOR papers, Dworkin seems to believe the very point of Hart's conventionalistic accounts is to provide a roughly naturalistic account of the meaning and truth conditions of legal discourse.

Hart's clarification in the Postscript of his own goals in legal theory is thus essential to understanding both why Hart and Dworkin often talked past each other and also why an opportunity for a greater convergence in their views was missed. As argued above, Hart was aiming to understand the sense in which legal practices were able to constitute law. It turned out, in his day of ordinary language philosophy, to be rather seductive to stretch such an account so that it looked as though legal facts rested upon social facts both metaphysically and semantically, and there is certainly a strain of such thinking in *The Concept of Law*. But that was neither his central aim nor his central point. The practice-based account of law, legality, and validity and several other concepts was the principal goal. There is nothing in Dworkin's coherentism that stops him from adopting such a conventionalism, so long as we stop short of reductive semantics. In this way, coherentist conventionalism is available as a reconciliation of Hart and Dworkin.

X. CONCLUSION

Hart's Postscript recognizes and responds to Dworkin's critique in MOR II. In vigorously defending his position on social rules while simultaneously embracing inclusive positivism, Hart invites us to see *The Concept of Law* as motivated less by a picture of rigid rules—as Dworkin suggested—and more by a 'model of social facts'. Yet, I argue, Hart's model of social facts is not adequately defended against the driving forces of Dworkin's MOR II critique. Dworkin was at root insisting that it was a conceptual confusion to treat rule-of-recognition statements as semantic-

[101] Dworkin, 'Legal Theory and the Problem of Sense', at 19.

ally equivalent to assertions that certain social facts obtain. In this insistence, he was right. We see the soundness of his critique *even within a Hartian framework* once we are able to develop a clear conventionalistic model of law and rules of recognition, and can build a semantics of rule-of-recognition statements upon that model. Rule-of-recognition statements assert secondary legal rules about validity, and their truth depends on whether what they assert about validity is so, not on whether certain social facts obtain. Hart avoided this conclusion by adopting an analysis of rule-of-recognition statements that made their truth turn on *whether* a social rule existed—whether certain social facts obtained. Once we shift to a coherentist framework in epistemology and semantics, however, we see that there are stronger philosophical reasons for treating rule-of-recognition statements in a manner that does not assimilate them to social facts statements, and for rejecting the model of social facts in the positivistic form in which Hart characteristically presented it.

This article has diverged in an important respect from several other commentaries on the Postscript which have displayed a great interest in Hart's embrace of inclusive positivism. That interest is understandable. As Jules Coleman presented it eighteen years ago, inclusive legal positivism promises to capture the best of both worlds.[102] For it offers an account of the facts about legal validity that is as unmysterious as practices themselves; this is a great appeal of positivism. On the other hand, it captures the appeal in Dworkin by making room for morality in law at the ground floor, in the criteria for legal validity. While I have argued above that a version of the model of social facts that treats legal statements as true by virtue of social facts is both untenable and undesirable, the argument left open what might be called an 'inclusive' view that is Hartian both in its analysis of legal systems and in its conventionalism. Such a view might adopt the central Hartian tenets that a legal system is a union of primary and secondary legal rules. And it might also contend that for a legal system to exist in a given community is for its rule of recognition to be treated as a social rule by legal officials. Its inclusivism would consist in its permitting systems with rules of recognition whose expression includes moral predicates to count as legal systems. Whether an inclusive positivism so modified is really a form of *positivism*, whether it can be defended against the authority-based critiques of Raz, Shapiro,

[102] Coleman, 'Negative and Positive Positivism'. Coleman recognized in that paper that '[I]t is well known that one can meet the objections to positivism Dworkin advances in MOR-I by constructing a rule of recognition (in the semantic sense) that permits moral principles as well as rules to be binding legal standards'. *Id.* at 35. Nevertheless, one of the ideas his paper is to be credited with is the recognition that a certain understanding of legal reality as constituted by social facts is consistent with Dworkin's emphasis on moralism, and that, therefore, what are arguably principal virtues of each theory can be reconciled.

and others, and whether it is, all considered, a tenable position are questions I leave for another time.

Instead, I have suggested that coherentist conventionalism offers another path to the reconciliation of Hart and Dworkin, another way to get 'the best of both worlds'. However, it begins with different judgments as to what the 'best' in each world is. The core strength of Hart is not his ability to keep law a matter of social fact. It is his fundamental yet detailed account of how it is that human practices make legal systems possible and give legal concepts content. Likewise, the core strength of Dworkin is not necessarily his ability to include morality in law, per se. It is his analysis of the complex and irreducible nature of legal discourse and legal justification, and his ability to turn these features of legal justification into a defence of the possibility of legal truth, rather than an abandonment of it. If this is right—if the best of Dworkin is his coherentism and the best of Hart is his conventionalism—then we can indeed have the best of both worlds, not as inclusive positivists, but as coherentist conventionalists.