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Positivism and Conventionalism

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1. The Foundations of Law

All positivists hold that law has social foundations. According to H.L.A. Hart, for example, the legal system rests on customary social norms followed by judges and other officials: norms that recognize other norms as belonging to the system and norms that provide for the application and alteration of the system's primary norms.[1] Even if this view requires amendment, it is likely any plausible account of the nature of law needs some account of social norms. Finding a fully satisfactory one, however, has proved surprisingly difficult.

One of the problems has to do with the normativity of law. We refer to laws as being 'valid' or 'invalid', meaning that they have or lack the normative force that they purport to have. A law that purports to obligate is valid if and only if it does so, otherwise it is invalid. But what makes a particular legal norm valid? We might, following Hans Kelsen,[2] say that it is valid if it is authorized by another, higher, norm. Thus, a judge's order is valid because it was created in ways permitted or required by the Judiciary Act, and that Act is in turn valid because it was created in ways permitted or required by the Constitution; and the Constitution is valid because it was created in ways provided for by another, earlier constitution. Of course, we cannot stop there, for even the first constitution is itself a just a set of laws, and we cannot without circularity explain the validity of law solely by reference to another law. That is the first horn of a dilemma. Here is the second one: neither can we explain validity by reference to a brute fact. How could the sheer fact that someone said that p or ordered that q ever validate a norm? Or how could a right to command emerge from the sheer fact that people are disposed to obey those who say that p or order that q? One might, at this point, insist on the moral authority of the first constitution or its framers, but that leaves legal positivism far behind. Positivists want to account for the idea that there are *legal* obligations, rights, and powers even in regimes that meet no plausible test of legitimacy. (Whether these legal obligations are also matters of *moral* obligation is of course a separate matter.) And this has much wider implications than is generally realized; it is *not* merely a problem of how we should regard wicked legal systems like those of the Nazis. As David Hume rightly saw, many—probably all—of the contemporary regimes that we are now inclined to think legitimate originated in force and violence. It is quite wrong, therefore, to suppose that these represent a borderline,

I am grateful to Andrei Marmor and Wil Waluchow for their helpful criticisms.

1. H.L.A. Hart, *The Concept of Law*, rev. ed. by P.A. Bulloch & J. Raz (Oxford: Clarendon Press, 1994).
2. Hans Kelsen, *The Pure Theory of Law*, trans. M. Knight (Berkeley: University of California Press, 1967); for an early version of the theory, see Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. B.L. Paulson & S.L. Paulson (Oxford: Clarendon Press, 1992 [f.p. 1934]), esp. 56-67.

marginal case, where we may be flexible in our language or theory.[3] If validity depends on the status of the *original* constitution, then the problem of wicked legal systems is just the problem of *all* legal systems.

So there is Kelsen's dilemma: at the root of the legal system there must be a norm, not a bare fact. But if it is a legal norm we have explained nothing; and if it is a moral norm we have abandoned positivism and probably any plausible account of the normativity of law. Kelsen's exit from the dilemma is this: he concludes that the legal system must rest on a "transcendental-hypothetical norm"—that provides the sole condition under which any law can be interpreted as validly binding. We must, he thought, *presuppose* that the ultimate orders, the first constitution, are binding and we must therefore presuppose a "basic norm." In his more Kantian moods, Kelsen saw this as the unique, transcendentally necessary, possibility-ground of interpreting the legal order as normative. That theory must now be judged a failure.[4] It has many serious difficulties and one fatal one: it confuses silencing a problem with solving it. Unable to answer the question of the normativity of law, it invites us to stop asking.

Kelsen failed to notice, or at least to understand, another alternative. Brute facts and moral norms do not exhaust the possible foundations of law. There are also institutional facts such as social norms, and these have a kind of normativity of their own. Social norms in turn require some explanation, and here too there are competing accounts. In this paper, I trace the recent fortunes of one influential theory of social norms, the view that they are *conventions*. I have on a number of previous occasions urged legal theorists to reject conventionalism.[5] Since then, however, there have been some significant developments in conventionalist legal theory. For example, Ronald Dworkin has suggested that legal positivism must present itself as a form of conventionalism if it is not to be a (false) semantic thesis about the word 'law'.[6] H.L.A. Hart, in revisiting his earlier account, himself comes to endorse a form of conventionalism. And a number of other writers have made conventionalism a good deal more sophisticated by blending theories of games and theories of practical reason. In spite of all this, however, I remain an unrepentant anti-conventionalist positivist, and would like to present some further reasons for thinking that the rule of recognition cannot be understood as a merely conventional norm. I begin with Hart, then move on to examine one especially careful treatment of conventionalism.

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3. Ronald Dworkin emphasizes the desirability of remaining "flexible" in our terminology in *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) at 104-08.
4. For decisive criticism, see H.L.A. Hart, "Kelsen Visited," and "Kelsen's Doctrine of the Unity of Law," both in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983); Joseph Raz, "Kelsen's Theory of the Basic Norm" in his *The Authority of Law* (Oxford: Clarendon Press, 1979). For a contrary view: J.W. Harris, *Law and Legal Science* (Oxford: Clarendon Press, 1979).
5. See my, "Law, Co-ordination and the Common Good" (1983) 3 Oxford J. Legal Stud. 299, "Authority and Convention" (1985) 35 Phil. Quarterly 329, and *The Authority of the State* (Oxford: Clarendon Press, 1990) at ch. 4.
6. Dworkin, *supra* note 3 at 37-44, 114-50.

2. Hart's Conventionalist Turn

When he first wrote *The Concept of Law*, Hart thought that the fundamental norms underlying law are matters of social practice. A practice rule exists, he said, if there is in a given group general conformity to a standard of behaviour, if deviation from that standard is criticized, if that criticism is regarded as appropriate, and if people use the norm to guide and appraise their own behaviour or that of others.[7] Now, although this has come to be known as the "practice theory of rules," I doubt that Hart ever regarded it as a complete *theory* of rules, i.e. a full account of their nature and function. Most of what he says suggests only the more modest aim of providing a test for the *existence* of rules. One can obviously have a test for the presence of something that tells us little or nothing about the nature of that thing: a Geiger counter will detect certain kinds of radiation, but it will not tell us anything about nature of radioactive decay.[8] Moreover, Hart's test for the existence of rules was designed primarily with one discrimination in mind: it was supposed to distinguish rule-following behaviour from mere coincidence or habit.

Even judged against this modest standard, however, the practice theory is open to criticism. One of the early, and persistent, objections is that the theory is inaccurate, for it detects the presence of rules where there is in fact nothing but generally applicable reasons. There are, for example, standard chess openings; but they are not required by any rule of chess. Nonetheless, they are generally practiced, other openings bring criticism (especially of novice players), this criticism is regarded as justified, and normative language—"you ought not to open that way", "that was the wrong move" etc.—is rife. There is a sound point in this objection, though it is often overblown and, as this purported counter-example shows, indecisive. The practice theory only offers an account of when it is true of a group, G, that it follows *some* rule or other, r_1—that is, when regularities in the behaviour of G are rule-guided. It is not, and never was, intended as a theory that explains when r_1 is a member of some system of rules R. Thus, while it is true that these prescriptions about openings are not among the rules *of chess*, the example does not exclude the possibility that they may be customary social rules of some other practice, for example, of *teaching chess*. Many similar counter-examples fail at this point: they rely on our intuitions that the regularity in question is not a rule of R in order to establish that it is not a rule at all.

The deeper difficulty in Hart's account is thus not this familiar point, but rather the fact that the practice theory does not explain the way that rules figure in practical reasoning in cases where their existence is uncontroversial. The fact that a valid rule exists may be cited as a *reason* for action. To the novice's question, "Why must I move my bishop diagonally?" a complete response is "It is required by the rules". Of course, one may have explanations, and perhaps also justifications, for the content of this rule, and there may be cases in which the fact that a rule exists does

7. Hart, *supra* note 1 at 55-61, 88-91.
8. I say a bit more about this distinction in "The Concept of Law Revisited" (1996) 94 Mich. L. Rev. 1687 at 1692-97.

not provide a conclusive reason for acting one way or another. But *as far as this question goes*, the citation of the rule is an answer, and any plausible theory of rules needs to explain how that could be so. This hurdle the practice theory fails to surmount. If rules are merely concordant practices that involve an internal attitude and normative language, it is hard to see how their existence could itself give anyone a reason for doing anything. The fact that most people ϕ and expect others to do likewise does not generally give one a reason for ϕ-ing. Typically, one should do likewise only if there is some further reason for conformity.

There are, however, special cases in which the fact of common practice does indeed give a reason for action, and these are the paradigm for conventionalism. The sort of examples that fall in this class are quite familiar: "Why should I spell the English word fish as 'fish' and not as 'ghoti'?" "Because that is how we all spell it." "Why should I drive on the left of the road when in England?" "Because that is where everyone drives." In such cases of purely *conventional norms* the fact that there is a convention is a reason—here an auxiliary reason—for conforming one's behaviour to that norm. Together with certain operative reasons, such as the fact that one needs to communicate effectively or to drive safely, these do indeed give one reason to conform.

It is evident that such coordination conventions, as I shall call them, cannot provide a general model for all customary social norms. It is a custom in my society that people sleep on beds rather than on the floor, but there is here no operative reason that makes common action rational. [9] Unlike the case of driving, we cannot understand this behaviour as issuing from a practical inference of the form: "We must all sleep the same way; here is how most people sleep; therefore I should sleep on a bed." There simply *is* no need to sleep the same way, which need is fulfilled by the presence of the custom. Likewise, it is a convention in musical suites of the French baroque that one does not normally end with an allemande; but that has nothing to do with need for some common ordering of the suites. Andrei Marmor has called these "constitutive conventions", and they are clearly quite different from the coordinating conventions of language or traffic.[10] Here, however, I restrict my attention to coordination conventions, which have not only been extensively discussed by legal theorists but also have some apparent attractions as a model for fundamental legal conventions. Most important, coordination conventions promise to explain how law is both positive—a matter of fact—and normative, or action guiding. The existence of a convention makes salient one of the alternative possible ways of coordinating action; it makes it the one to follow. That is not true of every general practice: the fact that there is a general practice of opening a certain way in chess is not itself a reason for opening that way. On the contrary, here the reason is simply the set of strategic considerations that justify the opening itself.

With these preliminaries in mind, let us turn to Hart's doctrine of the foundations of law. In his theory, the 'rule of recognition' is a social norm that identifies certain things as sources of law and thus provides the ultimate criteria for the validity of

9. See Margaret Gilbert, *On Social Facts* (London: Routledge, 1989) at 343.
10. See Andrei Marmor, "Legal Conventionalism" in (1998) 4 Legal Theory 509.

primary legal norms. Is the rule of recognition a convention? Hart is clear that the rule of recognition is a customary practice among judges and other officials, and that it satisfies the existence conditions for a practice rule.[11] But as we have just seen, a common practice is in not itself a reason for acting. So what reasons, in Hart's view, have officials for applying the rule of recognition? In *The Concept of Law*, Hart does not pronounce on this. The *existence* of the rule of recognition is determined by social practice: but for the fact that it is practiced and applied in official activity, there would be no such rule. But it does not follow from this that that the higher courts follow it *because* it is generally practiced. Just why they do follow it is a matter open to investigation, though it seems very likely that the reasons include the facts that they are paid to do so, that they fear the consequences of not doing so, and that they believe that important elements of the rule of recognition—for example, the fact that it recognizes acts of the legislature as sources of law—are consistent with sound political morality.

In the *Postscript*, published more than thirty years after the original text, Hart seems to have changed his mind about this.[12] In an attempt to evade some of Ronald Dworkin's criticisms of the practice theory of rules, Hart retreats and says this is no longer to be understood as a general account, but rather as a special case applying to conventional rules only. Hart also abandons his earlier view that social obligations are seriously enforced practice rules that have a particular content. But Hart also maintains that the practice theory is nonetheless right about conventional rules and is therefore the right account of the rule of recognition, which he now declares to be "a mere conventional rule accepted by the judges and lawyers of particular legal systems."[13]

Hart does not here analyze the notion of a conventional rule, though he seems inclined to adopt Dworkin's distinction between 'concurrent' practices, where people's actions converge for possibly independent reasons, and 'conventional' practices, where the fact of agreement is itself an essential part of the common reason for convergence.[14] People concur on a practice rule that prohibits murder, not because they are playing follow-the-leader, but because each thinks murder wrong, and thus independently comes to the same conclusion as the others. Indeed, they may concur on this rule for different and even incompatible reasons: one may believe it licensed by a naturalistic teleology, another by divine command, and so on. To adapt a term of John Rawls's, a custom may only be the focus of an *overlapping consensus* of people who have different routes to conformity—certainly that seems likely in the case of fundamental legal rules such as the rule of recognition. Some may think that legislative acts create law because that is democratic; some may think it efficient; some may think it a matter of tradition. In contrast, practices of right and wrong spelling, for example, can only be explained by reference to social conventions

11. Hart, *supra* note 1 at 94-99, 100-10.
12. This paragraph draws on my discussion in "The Concept of Law Revisited," *supra* note 8 at 1694-97.
13. Hart, *supra* note 1 at 267.
14. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978) at 53-58.

about how words are spelled: here it just makes no sense to suppose that there are converging convention-independent standards of correctness.

Perhaps Dworkin's distinction is what Hart has in mind when he calls the rule of recognition a 'mere conventional rule.' On the other hand, something weaker is suggested in other remarks. For example, Hart also says that the rule of recognition "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."[15] Read strictly, this specifies only a necessary condition for the existence of the rule of recognition: it exists only if accepted and practiced by the courts. That suggests something rather different from the idea that it is a mere convention, for in the case of a mere convention the fact of common practice is not just necessary but also sufficient to motivate conformity. The following more extended comment also seems to reinforce the weaker interpretation:

> Certainly the rule of recognition is treated in my book as resting on a conventional form of judicial consensus. That it does so rest seems quite clear at least in English and American law for surely an English judge's reason for treating Parliament's legislation (or an American judge's reason for treating the Constitution) as a source of law having supremacy over other sources includes the fact that his judicial colleagues concur in this as their predecessors have done.[16]

The point to notice here is that judicial consensus, if merely a *necessary* condition for the existence of a rule of recognition, does not show that the rule is conventional in Dworkin's sense. Clearly, a judge may treat parliamentary legislation as a source of law for reasons that include the fact that other judges do so and have done so even though that does not exhaust their reasons for so treating it, and does not even exhaust the necessary conditions. Depending on what these other necessary conditions involve, the rule of recognition may or may not be a merely conventional rule.

Suppose, as is quite likely, that one of the reasons that judges treat parliamentary legislation as a source of law is that they believe in democratic governance, and they think that the will of the majority, even when as dilute as it is in a regime of cabinet government, is therefore a legitimate source of law. (It is not required, of course, that these beliefs are correct.) Suppose that they also endorse the view that no political authority is legitimate unless it is also efficacious, that is to say, unless it can actually secure a substantial degree of compliance among both officials and the general population, at least with respect to its mandatory norms, and that this requires consensus. Notice that neither of those beliefs presupposes the conventionalist thesis, though they do jointly entail that the judges' reason for treating legislation as a source of law *includes* the fact of judicial consensus. Consensus is essential to efficacy; efficacy is essential to legitimacy; and the legitimacy of Parliament is necessary condition for the normativity of law. It would be misleading, however, to describe this as a situation in which the rule of recognition is a 'mere convention', for an essential part of the rule is the fact that the judges have certain

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15. Hart, *supra* note 1 at 256.
16. *Ibid.* at 266-67.

beliefs about political morality and legitimacy. The fact of common practice is not here an independent reason for action, and but for its role as one of the necessary conditions of legitimacy, it would not even be relevant. Contrast that with the rule of the road. Here, there is no independent significance of anyone's beliefs about the intrinsic merits of driving on one side or the other. People may, of course, come to have such beliefs, and they may become so dominant that people begin to think that their practice is not conventional but in some sense natural.[17] ("Surely it is only *right* that one drives on the *right*," they may speculate.) So the fact of common practice may be relevant, or even necessary, to an explanation of the rule of recognition, without that entailing that the rule of recognition is a mere convention in any significant sense.

Let me underscore that I am not here arguing that this is the *correct* view of these things, but only that it is not excluded by Hart's last writings, and that it is not a conventionalist view. Hart's conventionalist turn thus seems unmotivated. But perhaps we can fill out his account by relying on the special sense of coordination conventions that I sketched above. For if the rule of recognition is a convention of *this* kind, then, as we have seen, its existence does provide a kind of reason for conformity to it. This is not an argument that Hart makes, but it has been most forcefully made by a number of writers in the Hartian tradition. If the rule of recognition is a coordination convention, then we may have another exit from Kelsen's dilemma: a social fact that it at once positive and, in a way, normative. To that possibility I now turn.

3. Coordination Conventions

Some years ago, a number of legal philosophers adapted to their own purposes a theory of convention derived from the influential writings of Thomas Schelling and David Lewis (though important elements of the view are present as early as Hume and Bentham).[18] In some cases, the move was quite detailed and explicit; just as often these ideas were invoked in a somewhat casual, even haphazard, way. The leading idea is this: there are situations ('coordination problems') in which it is instrumentally rational to coordinate one's action with that of others and in which it is more important that we coordinate than how or where we do so. For example, it is more important that a country uses some common unit of exchange than any particular one, even though some may be better than others. Or again, it is more important that computers run mutually compatible operating systems than

17. Tyler Burge effectively makes the point that people may be mistaken about the conventional status of regularities they follow in his "On Knowledge and Convention" (1975) 84 Phil. Rev. at 249-55.

18. Thomas Schelling, *The Strategy of Conflict* (Oxford: Oxford University Press, 1963); David K. Lewis, *Convention: A Philosophical Study* (Cambridge, MA: Harvard University Press, 1974). For some typical statements of the thesis, see: Chaim Gans, "The Normativity of Law and its Co-ordinative Function" (1981) 16 Israel L. Rev. 333; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); Gerald Postema, "Coordination and Convention at the Foundations of Law" (1982) 11 J. Legal Stud. 165.

that they run any particular one. Indeed, as history demonstrates, compatibility is even more important than is a good or efficient operating system. When a practice emerges to solve such problems, it involves the well-founded mutual expectation of coordinated behaviour. We might therefore say that a convention of using a certain means of exchange, or a certain operating system, has emerged. Once such conventions exist, they are self-sustaining, for people would rather meet than miss, even if they have preferences among meeting places, and the existence of the convention, because it helps to solve the coordination problem, gives a reason for acting. Legal conventionalists argue that this is what law most fundamentally does.

As far as I can tell, all but a few of its original proponents have now either abandoned this theory or qualified it out of existence.[19] Of those who have kept the faith, Eerik Lagerspetz offers one of the most careful and interesting elaborations of the view, and I shall therefore take his account as my model when a specific one is needed. First, though, I want to isolate certain areas of agreement between the conventionalists and me.

We have, I think, no dispute about the following propositions:

1. Legal systems help coordinate social action.
2. Their capacity to do this is sometimes valuable.
3. Neither (1) nor (2), nor both together, suffice to establish that every legal system is morally legitimate nor that there is a prima facie moral obligation to obey the law.

It is not difficult to defend (1) and (2), for they are both very modest claims. In particular, (1) does not say that coordinating social action is a unique, universal, typical, or even primary function of legal systems. Law does a lot of things apart from coordinating action, and that is as it should be: law should also do justice, provide goods and services, express sound values, and so on. In an earlier work, I ventured the opinion that it is also a major function of political authority not only to solve coordination problems, but also to *prevent* them from being solved (e.g. by trust-busting) and to replace some conventional solutions with non-conventional solutions preferred on grounds of efficiency or justice.[20] It is true, however, (and I am in debt to Lagerspetz for clarifying this[21]) that an authoritatively imposed norm may nonetheless become a convention, and thus that in addition to solving unsolved coordination problems, law may also replace inferior conventional solutions with superior ones. That is so. I ought to have put the point this way: one important function of legal systems is to prevent certain kinds of social coordination, and another is to settle things according to justice in a way that is non-conventional. That is, rather than choosing solutions from among the set which leave no one with incentive for unilateral defection, the law should sometimes support outcomes which

19. For example, John Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory" (1984) 1 Notre Dame J. of Law, Ethics and Public Policy 115.
20. Green, *Authority of the State, supra* note 5 at 117.
21. Eerik Lagerspetz, *A Conventionalist Theory of Institutions*: 44 Acta Philosophica Fennica (Helsinki: Societas Philosophica Fennica, 1989) at 83. Reprinted as *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions* (Dordrecht: Kluwer Academic, 1995).

do give such incentive but then provide for their coercive enforcement against those who are tempted to defect. (In fact, I suspect that this is a more important function of legal and political systems than is strict coordination, but that point need not be argued here.) Of course, these points are consistent with the truth of (1) and I should want to insist on it. *One* of the things that legal systems do is to coordinate social action.

Likewise, (2) is also a sound and modest claim. It does not say that coordination is always a good thing. Can it be doubted that the legal systems of North Korea or Iran coordinate action in various ways? Reflecting on this evident fact does not much change our moral attitudes towards them. And that is why (3) also seems quite secure: an illegitimate legal system generally does quite a lot of coordinating, often for immoral ends, and we therefore need a good deal more argument to show that its successfully fulfilling a coordinative function provides any sort of moral reason for general obedience to law.

The disagreement between the conventionalists and me is not therefore a matter of any of those three claims. I take it to centre on the following:

4. Neither (1) nor (2), nor both together, are sufficient to explain the normative character of law. And, in particular,
5. Neither (1) nor (2), nor both together, warrant anyone regarding the law as authoritative.

The relation between (5) and the similar-sounding (3) is this: If there is a general obligation to obey, then law has all of the authority it claims. But law may have *some* authority without that going so far as to establish a general obligation of obedience. (5) denies that conventionalism can even explain this more limited authority of law. I say that (4) and (5) are true, but conventionalists believe that they are false. They maintain that the normative character of many legal norms can be adequately understood in terms of their coordinative functions, and also that their capacity to perform these functions is at least sometimes a good reason for regarding laws as authoritatively binding. Only if (4) and (5) are true would conventionalism provide an exit from Kelsen's dilemma, and these are therefore the crux for conventionalist legal positivism.

4. The Authority that Law Claims

Thus we reach the notions of authority and obligation. Many writers offer inadequate accounts, or even no accounts, of these concepts and by this negligence lend conventionalism a certain spurious appeal. And yet it should be obvious that this is an important point, for it is obvious not all conventions impose obligations. It is a convention in my society that men do not wear skirts, but there is no obligation to refrain from doing so. It is a convention in my society that we speak English, but there is no obligation to do so. Thus, the conditions necessary for the existence of a social convention with respect to ϕ-ing are not sufficient for the existence of an obligation with respect to ϕ-ing. Many conventionalists falter at this point. They argue that social convention is the root of social obligation but fail to produce a

satisfactory account of why some conventions are not obligatory.

Law, unlike these conventions, must be understood as making a certain exigent demand on our compliance. Its requirements purport to be mandatory: it claims to obligate rather than to advise, threaten, or persuade us to comply. Of course, not every law is a mandatory norm, but every legal system contains mandatory norms and they are among its most important features. Philosophers have offered competing accounts of the exigent character of legal norms, and I cannot pause to review them here, but I believe that the best is one that explains it partly in terms of a certain structure of practical reasoning.[22] A norm is obligatory only if it offers a reason for acting as it requires and a reason for not acting on certain valid reasons against acting as it requires. Law is exigent, on this view, not because it offers very weighty reasons for acting, but because it demands compliance in the face of certain admittedly valid competing considerations. Because it excludes certain considerations, we may say that it offers exclusionary reasons for compliance.

Now, this does help distinguish the normative character of obligations from that of ordinary social conventions. The powerful reasons we have for settling on a common means of exchange, a common calendar, or a common language, have nothing whatever to do with the value of informational *restrictions* on practical reasoning. Indeed, it is the ordinary process of *balancing* all reasons against each other, taking into account all the available information, which itself recommends these practices. As we shall see, there is therefore a fundamental difference between practical reasoning on the basis of norms or rules on the one hand and practical reasoning in environment of coordinating conventions on the other.

Coming to grips with the conventionalist argument requires also another step. The authority of law shares the above features with all practical authorities, but it has further special features as well. In particular, we should notice that it claims supremacy over other social authorities, that it is of a wide scope, and that it purports to guide the behaviour of many people. This does not mean that every legal system claims absolute authority; most of them recognize and respect certain limits. The point is rather that law itself sets the only limits to its authority that it is willing to recognize. This, among other features, marks law as a particular *kind* of social authority. Here we join the first substantial issue: can conventionalism explain how law could be an authority of the relevant kind?

My claim, in *The Authority of the State*, that conventionalism here fails turned on a comparison between the way political authority creates conventions and what I called 'ordinary' conventions. Unfortunately, that term was ill chosen, for it covers a variety of different modes of social coordination. Consider only the following types:

1. unintended coordination
2. deliberate coordination
   2.1 non-authoritative
   2.2 authoritative

22. See Joseph Raz, *Practical Reason and Norms*, rev. ed. (Princeton, NJ: Princeton University Press, 1990) at 49-84.

2.21 decentralized
2.22 centralized
2.221 special purpose
2.222 general purpose

First, some cautionary remarks about this tree. By 'unintended' coordination I merely mean convention-creating actions that are not done with the intention of creating coordination conventions, though of course they may be by-products of other intentional actions. Norms that arise by chance are also unintended. In contrast, deliberate coordination comprises acts done with the intention to create coordination norms. Commands, agreements, threats, etc. all count as deliberate. This tree does not pretend to give an exhaustive list. On the contrary, it is deliberately incomplete; for example, it ignores non-authoritative, centralized regulation, and so forth. I have only tried to include some of the major forms of coordination that we do in fact find in our societies, in order to keep before us a sufficiently rich sense of the various resources at our command in solving coordination problems.

Now, what I called 'ordinary' conventions certainly includes 1, but it also includes 2.1 as well. The authority that parents exercise over their children, when it is used to create familial conventions, would fall under 2.21. Much of the authority of legal systems, on the other hand, belongs under 2.222: it does not leave coordination to chance, but uses centralized institutions that deliberately prescribe certain behaviour and purport to do so with general scope, and so on. The fact that there is in principle a wide variety of modes of coordination is important, for conventionalists often argue as if the alternatives to legal and political authority are fewer than they in fact are, or are all infeasible. This seems to me to be a flaw in Lagerspetz' argument, as in those of many other conventionalists. He notes that there are many situations in which it would be simply insane to wait in the hope that the slow evolutionary processes of chance might give rise to a custom. For example, he rightly asks, "When the Channel Tunnel is opened, will the drivers in the surroundings of Dover begin to drive on the right? Will this new habit then gradually be diffused to the other parts of Britain? The absurdity of such a spontaneous change of conventions shows how important authorities can be."[23] History proved him right. But the absurdity of leaving things to chance does not, however, show how important authorities are, nor even how important they can be. It only shows that it is sometimes urgent to have deliberate as opposed to non-deliberate coordination, i.e. that the whole of branch 1 may sometimes be out of the question. The tunnel example may show that a general purpose, centralized authority is better in coping with such problems than is chance; but it does not show that it is better than all forms of non-authoritative regulation (e.g. a system of coercive threats) or better than having a limited, special-purpose authority. Consider the following example: with the proliferation of wireless phones, many more conversations are cut off owing to interference and to the fact that signals may fade with distance. Who then should call back? We might leave the matter to chance, but it would

23. Lagerspetz, *supra* note 21 at 82.

surely be better if there were a shared understanding that either the one who initiated the call or the one who received it should reestablish the communication. Does that show that there should be an *authoritative* determination of the matter? Perhaps even a law? Plainly not. But in between doing nothing and legislating there are many alternatives: phone companies might make suggestions, consumer groups might offer advice, and so on. That such solutions might possibly work is established by the fact that they sometimes actually work.

A general-purpose, supreme authority has its uses, but it is also a pretty rigid thing that may over-stabilize customs and thus may hamper certain kinds of necessary social change. Their obsolescence in rapidly changing environments was one of the reasons that Bentham disapproved of the persisting validity of unrepealed laws. Whether coordination problems call for legal solutions is thus a matter that is highly context-dependent: no general conclusion may be drawn. One might object to this line of argument by appeal to the following consideration. As Kelsen and others continually emphasized, law governs its own creation and is thus potentially less rigid than custom. Indeed, one of the great advantages of law is that it can change its conventions with immediate effect. Similarly, Hart holds it to be one of the substantial virtues of the legal system is that it has precisely this flexibility. To put it metaphorically, we might think of law as a normative system come to self-consciousness, for while in any social order customs are liable to change, in a legal order they may be changed deliberately and with immediate effect. This is true enough, but it is too coarse-grained. Hart is sometimes read to argue that it is *only* with the emergence of law that deliberate regulation becomes possible, that pre-legal societies are mired in the stasis of custom.[24] Perhaps the conventionalists have taken over this thought. Unfortunately for them, however, Hart's association of rules of change and other power-conferring rules with legality is a product of his multiply ambiguous notion of 'secondary' rules. All societies have found ways to deliberately manipulate their normative environments; legal orders may here exhibit a difference of degree, but not a difference in kind. What is distinctive about law is not this, but rather the fact that crucial aspects of the normative environment become systematized and, above all, institutionalized—and this is very much a mixed blessing, as Hart clearly understood. The emergence of a special set of law-producing, law-identifying, and law-applying institutions may allow for more rapid adaptation to certain kinds of social change, but at the same time it creates new hazards: the law may get out of touch with social custom, the official class may become tyrannical, people may feel alienated from the most important social norms in their society, and so on. Thus, while all forms of deliberate coordination do confer advantages in rapidly changing social environments, there is thus far nothing to show that this can only or best be attained by the centralized, general-purpose authoritative regulation characteristic of law.

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24. I think this is a misprision of Hart. See my "The Concept of Law Revisited," *supra* note 8.

5. Why Authority?

Above, I urged that we not oversimplify the alternatives in assessing the role of law in establishing coordination conventions. One might, however, argue that, so far from avoiding the need for authoritative regulation, the other alternatives would in realistic cases often require it. Lagerspetz considers the example of a group of teachers trying to settle on a lecture schedule. Each has individual preferences among the possible outcomes, but also an overriding common interest in settling on some schedule or other. How should this be achieved? Granting that chance is out, what forms of deliberate settlement might they consider? "The agents could negotiate and try to settle an unanimously accepted solution. But negotiations are often boring and they take time; the teachers may have more important things to do. Instead of negotiating, they may delegate the task to some individual...."[25] This is, I take it, meant to model some central reasons for the emergence, and value, of law.

Unanimous agreement is one form of deliberate regulation that does not leave matters to chance. Here, however, it is suggested that delegation of decision-making power to one person would be a preferable procedure. That may be; but once again we need to examine the *full* set of feasible alternatives, not just the single pair of unanimity and authority.[26] We would need to evaluate, for example, also random decision procedures, less-than-unanimity decision rules, and so on before we conclude in favour of a centralized authority. Moreover, the delegate in question is significantly disanalogous to a *legal* authority because he or she has but limited competence—in terms of our earlier classification, we are talking about 2.221 authorities and not 2.222 authorities. There is no question of creating a supreme authority here, and thus the arguments for the superiority of the delegate will not apply directly to the question of the superiority of legal systems.

That does not, however, take us to the heart of the problem, which is this. Granted that negotiations are boring and take time, how does the selection of a delegate avoid this? How will the delegate be chosen and how will the scope of his powers be decided? That too takes time and may be equally boring. Should they also delegate the choice of delegates? Obviously, at the top of the pyramid, they will have to rely on *some* kind of non-authoritative settlement, and this will have the very flaws that worry Lagerspetz and the other conventionalists.

Does it help that the point of a pyramid is smaller than its base? One might argue that because ultimate conventions need arise only among the smallish group officials—say, judges and legislators—they are more likely to do so than is a general convention among the whole population.[27] There is an important point here. As I said above, it is a fundamental feature of legal systems that they are institutionalized normative systems: the emergence of an official class is a crucial step in the evolution of law. It is in part because of this that the community as a whole does not

25. Lagerspetz, *A Conventionalist Theory of Institutions, supra* note 21 at 77.
26. John Finnis makes the same mistake: *Natural Law and Natural Rights, supra* note 19 at 232.
27. Lagerspetz, *supra* note 21 at 133.

need to accept or even know the law. However, even if there were some general reason for thinking that it is always easier to form a convention among small groups than large, this fact is not relevant to the problem at hand. As Postema has argued, officials could not *succeed* in coordinating mass behaviour if they did not, to a significant extent, attempt to coordinate not only among themselves, but also with society at large.[28] Even if we decide to leave certain important social decisions to judges, it is the judges must still lead tentatively, with sensitivity to public opinion, for in the long run their ultimate tools of compliance are limited. Of course, this provides no guarantee that the judges will act in the public interest, do justice, or anything of the sort—as I said above, one may coordinate action for either good or ill.

The production of a common, public view about what is to be done may in some cases be one of our goals. It is true, as Lagerspetz writes, that when the legal system is functioning well, "...I can rely on the belief that the others have consulted the same sources and expect that I have done the same."[29] That may suggest that the function of the rule of recognition is to be such a coordination convention. But that satisfactory state of affairs is a *conclusion* that one must reach, not a premise on which one may safely rely. The serious argument for the feasibility of a general-purpose authority is here concealed by the tacit assumption that there is such an authority waiting in the wings, as it were. The creation of a general-purpose authority, on the conventionalists' own argument, ought to be a coordination problem—and a high-stakes, high-risk one at that. Since a general-purpose authority cannot ultimately be created by authority, it must itself be liable to the very objections that the conventionalist wishes to ply against other resolutions to first-order coordination problems.

I need to be clear about the scope of this claim. I am neither denying that compliance with authority is sometimes rational—it surely is—nor that authorities can sometimes resolve coordination problems. I do not even deny that we may in some contexts be able to state some general necessary conditions for this. All that is as may be. My claim is, first, that we can and do often create coordination conventions without any authority; second, that there is no reason for anyone to regard an existing coordination convention as authoritatively binding; and, finally, that that there are no generally sufficient conditions for the rationality of authoritative coordination: it is always context dependent.

Lagerspetz argues that, under conditions characterized by rough equality of power among the parties, positive transaction costs, and a feasible, efficacious and impartial authority, it will sometimes be better to have authoritative than non-authoritative decision-making. (More exactly, where there are cardinal measures of utility and probability, the necessary and sufficient condition for the rationality of authoritative coordination is that the agent judges the expected value of authoritative resolution to him to be greater than or equal to the expected value of a situation in

28. Gerald Postema, "Coordination and Convention at the Foundations of Law," *supra* note 18 at 188-94.
29. Lagerspetz, *supra* note 21 at 76.

which "he is able to persuade, bribe, or threaten the other party to accept the solution preferred by him...."[30]) But this fails to compare authoritative coordination with of other forms of non-authoritative deliberate regulation. We might, for example, hire a third-party coercer who neither purports to obligate us nor is so recognized, but is able to make non-coordination less attractive as an option. Could one reply that positive transaction costs would outweigh the possible benefits of hiring a coercer? (Whom should we hire?) That depends on the level of those costs. If coordination is *preeminently* valuable, and if authority is the *only* feasible way of establishing a coordination convention, and if the authority of law is the *only* feasible sort, then it is rational to comply with it, *provided* it is also rational to expect others to do so as well. But the legal system does not confine its reach to this narrow set of conditions. Law also claims authority when it seeks to prevent coordination, when it replaces coordination equilibria with other kinds of solutions, and when it performs all of the other functions of legal systems. Any theory of the normativity of law needs to have proportionately wide ambitions.

6. Conflict and Consensus

Thus far, I have been trying to show how fundamental legal norms differ from conventions, at least where the latter are understood as coordination norms. In some ways, it seems that these differences are almost *too* obvious, and that may make us wonder about the basic motivation for this type of theory. I want to conclude therefore with some wider speculation about the sort of general social theory that might make such a doctrine seem attractive—though I emphasize that these thoughts are meant to be suggestive rather than conclusive.

Conventionalists are, I think, attracted to a view of law that is both functionalist and consensualist. They believe that the nature of law is determined by the general social function that law fulfils, and that its capacity to fulfil its function is underwritten at a fundamental level by our common interests.[31] Some conventionalists are open about this. John Finnis, for example, believes that there is an essential, defining, purpose to law—it must coordinate action for the common good—and he believes that in spite of all the evident surface conflict among people of different classes, genders, races, sexualities, and so forth we are, at the end of the day, all in it together and thus have a fundamental, over-arching interest in a common authority than can moderate the losses and gains from social interaction.[32]

This seems to me a central feature of legal conventionalism: in order to generate the proper reasons for conformity, there must be no radical conflict of interest and the conventions must be mutually beneficial. But here 'mutual benefit' is given a certain interpretation. A combination of actions is mutually beneficial if no one has any incentive to depart from it unilaterally. A major difficulty for conventionalism is to account for the exclusionary character of authoritative rules in light of

30. *Ibid.* at 79.
31. I discuss functionalism in general in "The Functions of Law" (1998) 12 Cogito 123.
32. John Finnis, *Natural Law and Natural Rights*, passim.

this conception of the common interest. If mutual benefit *itself* recommends compliance with a norm, then why would we further impute to that rule exclusionary force? That is needed to exclude action on otherwise valid considerations that, if acted on, would threaten compliance. But what are those considerations in the present case? There are none: people's preferences among equilibria are defeated by their overarching preference for conformity. The fact that the rules are mutually beneficial in the above sense *itself* secures compliance: first-order, strategic reasoning is enough. This fact in itself provides no solution to the problem—there is still a need somehow to settle on an alternative—but once the solution is attained, the rational appeal of the defeated, non-coordinating alternative ends, for it is now outweighed.

Objecting, Lagerspetz writes: "Green is wrong in supposing that all agents need to have the same or approximately similar interests in Lewisian coordination situations, so that there is no room for bargaining or considerations of justice. Actually it is a logically sufficient condition for the existence of a CP [coordination problem] that all agents will prefer any equilibrium outcome to every nonequilibrium outcome. There can still be room for a conflict of interests concerning different equilibria."[33] In other words, conventions are present not only in games of pure co-ordination, but also what game theorists sometimes call 'battles of the sexes'[34] in which people would rather meet than miss, but have preferences among meeting points. Where there are conflicting interests there are, after all, valid competing considerations which may need to be excluded if we are to attain over-all, beneficial coordination of our actions. Or so the argument goes.

I believe that there is a confusion here, and also an error. First the confusion. *That* sort of conflict of interest is indeed compatible with the existence of a coordination problem; but I never supposed otherwise. What I do suppose is that in any coordination problem there can be no *radical* conflict of interest, i.e. conflict so great that it overwhelms the benefits of coordination. I therefore maintain that a social institution is conventional only if agents have, in this sense, approximately similar interests. The remaining question is what role threat-advantage or fairness might play in this context. It is not my claim that because there is no radical conflict of interest there can be "no room for bargaining or considerations of justice." These do presuppose some potential for conflicting interests, but conflicts can be well short of radical. What I say is that "If contrary preferences are strong enough to outweigh preferences for conformity, then there is no common interest strong enough to create a coordination problem and the problem will instead be one of bargaining or arbitration, the outcome of which depends on threat-advantage or on considerations of fairness. Neither of these provides a conventionalist justification for authority."[35] That does not entail that, under conditions of mutual interest, there is no room *at all* for bargaining or arbitration. Under conditions of

33. Lagerspetz, *supra* note 21 at 76-77.
34. So called after an early sexist example: a man and a woman want to go out together, but he wants to see the prizefight, she the ballet. R.D. Luce & H. Raiffa, *Games and Decisions* (New York: Wiley, 1957) at 90-91.
35. Green, *Authority of the State, supra* note 5 at 115.

predominant mutual interest, it is not the case that contrary preferences outweigh preferences for conformity, so the antecedent of my conditional claim is false. Modest conflict among preferences is indeed compatible with the existence of coordination conventions; radical conflict is not.

And now for the error. It is wrong to suppose that exclusionary reasons are needed in coordination situations characterized by modest conflict. These call for nothing more than strategic thinking about the balance of first-order reasons. If I have a preponderant interest in making myself understood to you, and if we both speak French and English but my French is good and your English poor, then I had better speak to you in French. Even though I might *otherwise* prefer speaking my mother tongue, I do not *in the circumstances* prefer that so strongly that I am prepared to forgo communication. My reason to speak to you in English is thus simply outweighed; it is not a persisting valid reason than needs to be *excluded* from consideration lest it tempt me off course and I therefore fail to make myself understood. The same is true of general conventions: if there is reason for Britain to enter the European monetary union, there is reason for it to use the Euro instead of the Pound. Even when laws do function as coordination conventions, there is no need to regard them as excluding from consideration competing reasons for non-conformity; those reasons have already been given full credit and have been outweighed. In elaborating and defending Bentham's version of normative conventionalism G.J. Postema essentially admits this. He writes,

> Rather than excluding some or all independently relevant practical considerations from the practical reasoning of individual citizens, law, in Bentham's conception, seeks to focus expectations and thereby alter the environment *within which* rational individual citizens exercise their 'right of private judgment'....[36]

Why do conventionalists not more readily embrace the consensus-emphasizing aspects of their position? They are keen to emphasize the relatively modest conflicts of preference among equilibria, but not the relatively large common interest in any equilibrium as compared with any non-equilibrium. Why don't they join Finnis and openly defend the position to which their thesis commits them, namely, that social life is largely a matter of securing a common good, and that law has as its core that essential function? Perhaps it is because of the manifest weakness of the claim. For notice what it does not establish. It does not entail that the common good is *optimal*, for someone might be better off and no one worse off under a different equilibrium. It does not entail that it is *utility maximizing*, for some other combination of actions might produce more net benefit than the present one. Finally, it does not even entail that there is *no incentive* to depart from it, but only the incentives are insufficient to motivate *unilateral* departure. Depending on the prospects for successful collective action, there may be plenty of incentive for multilateral departure. Thus, to say that a convention is 'mutually beneficial' in the coordination sense is not to say much in its favour. No doubt many social institutions are such that they are, in spite of their manifold imperfections, better than any individual

36. G.J. Postema, "Bentham on the Public Character of Law" (1989) Utilitas 41 at 49.

could do unilaterally, if that means without the benefit of any social institutions. Perhaps even the Taliban regime is better for its oppressed women than any one of them could do on her own. But that is plainly no recommendation. To compare unilateral non-cooperation with universal cooperation is uninteresting. The real options are not falling in with the crowd or going it alone, but falling in with the crowd or going along with some smaller clique. One might therefore ask, instead, whether an institution is such that no coalition of multilateral non-cooperators would do better. This is a much more interesting question, and it is not asked because the answer is obvious. Hardly any of our actual law-created conventions have this property.

7. Conclusion

I do not think we should anticipate a very fertile union between positivism and conventionalism in the sense discussed here. Conventionalism is certainly not entailed by the view that law has social foundations, and the relevance of official acceptance of and conformity to the rule of recognition can, I have argued, be explained without supposing that the rule of recognition is a coordination convention, or even that any common set of reasons is endorsed by judges who apply it. Moreover, even the rehabilitated form of conventionalism still cannot answer the deepest objections to that theory: useful conventions may be established without the authority of law; law does much more than coordinate action; and coordination conventions lack sort the sort of normative force that law claims. For these reasons, I continue to think that positivists should reject the theory.