Special Issue
The Many Fates of Legal Positivism

The Spirit of Legal Positivism

By Alexander Somek[*]

A. Gauging the State of Legal Knowledge

Legal Positivism is dead, isn't it? We are all legal realists now. We believe, by default, that what really matters in law emerges from some judicial process.[1] We sense that the point of norm-production by adjudication is to accomplish something useful or good for either individuals or society at large. Practice trumps theory and policy implementation overrides respect for some scholarly edifice. What we do when we do law is to unreel formula and rhetoric. We engage in these exercises with the aim to have judges rule in favor of our clients. Should we be judges ourselves, we promote causes we deem to be noble and fine. Law is a tool. Skillfully mastered legal knowledge is a prerequisite for using it well.

I concede that this is an over-generalized and highly pointed statement. It is meant to capture a jaded state of mind to which Duncan Kennedy has since the late 1980s referred as "postness." The debates are over. Controversies over great ideas have subsided. The scene is finally dominated by those whom Oliver Wendell Holmes long suspected to be mere businessmen.[2] Law is a trade. If you are smart and know how to enact your craft, the forthcoming financial rewards will be sizeable. You'd better adapt.

I am confident that my account of the overall intellectual situation, even though undoubtedly impressionistic, is not entirely mistaken about what has become common wisdom among practitioners and those pursuing an academic career. The situation is reflected, even though in different ways, in the general attitude towards legal scholarship found in the United States as well as in Europe. In the case of the former, what is done in the academic realm is largely, though not exclusively, based on the understanding that producing law review articles is a way of improving, however causally obscure, the world. While the style of exposition ranges from more fully fledged *amicus curiae* briefs to larger blueprints of human life, the underlying attitude is that of the scholar attempting to do his or her bit to make the world a better place. The law is secondary with regard to the

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[1] Felix Cohen, *The Problems of a Functional Jurisprudence,* 1 MOD. L. REV. 5, 7–8 (1937).

[2] Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991–1009 (1897).

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general moral obligation to work towards amelioration, which comes first. Surprisingly, the addressee of engaged writing is—aside from a court that pays scant attention to it[3]—some imaginary sovereign invested with plenary power to implement the program. Without exception, however, is it taken for granted that changing the world is a piecemeal affair, which requires neither large-scale social transformations nor, heaven forbid, amending the United States Constitution.

The continental European milieu is different.[4] Scholarly output is expected to be useful for those in the trenches. Hence, one gets an overabundance of handbooks, commentaries, textbooks and outlines. More specific contributions are supposed to signal the capacity, on the part of the authors, to generate meticulously drafted expertise. Incidentally, the academic world is inhabited by people who consider themselves underpaid and are therefore eager to sell the fruits of their labor (and the time and energy of their assistants) to whoever is willing to pay for it.

The intellectual effect of this situation is not particularly favorable to legal theory, let alone legal positivism,[5] even though I should emphasize that the overall milieu is far more hospitable in the United States than in mainland Europe. In the case of the former, legal analysis is approached with the desire of social reform. The basic technocratic thrust of this vision is often mitigated by widespread moral concern. I think it is therefore fair to say that in the United States is prevalent a tendency to produce legal scholarship on moral high ground. By contrast, in continental Europe legal knowledge comes in monetary form. I do not mean to suggest, of course, that whatever legal knowledge exists is subservient to one or the other clientele; rather, the *form* of legal knowledge—visible in its intellectual horizon and rhetorical demeanor—is dominated by the drive to be marketable as expertise. This leaves an imprint on its physiognomy. Legal knowledge is largely descriptive, technical, and deferential in relation to courts. It lacks the courage to challenge taboos. Simplifying matters even further, it makes sense to say that while legal scholarship is highly moralized in the United States it is, by contrast, thoroughly intellectually commodified in Europe.

[3] The chances for a law review article to be cited by the United States Supreme Court are infinitesimally slim.

[4] The United Kingdom is a very special case owing to its relatively late arrival to the world of academic legal scholarship.

[5] Of course, a host of other factors contribute to the fact that legal positivism appears to be terribly outdated. A society marked by rapid technological development and the internationalization of commerce is difficult to reconcile with a mindset for which legal codes or commands appear to be the paradigmatic instances of law. RONALD DWORKIN, JUSTICE IN ROBES 212 (2006).

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In both cases, however, legal knowledge is controlled by some external agenda. It fails to control the reasons governing its operation. The production of legal expertise either vies for moral praise or panders to the interest of potential buyers. Owing to the social circumstances governing its production, it remains in an intellectually underdeveloped state.

B. Legal Positivism's Demise

It would be too facile to single out courts as the culprits for the unacknowledged triumph of these two different versions of being a realist—the moral reformist, on the one hand, and the instrumentalist legal scientist, on the other. Undeniably, however, important tribunals, such as the European Court of Justice and the German Federal Constitutional Court, have done their share to devalue the relevance of scholarship. Both bodies have developed their case law in amazingly brazen, free-style fashion. The relentless social engineering by the former[6] and the *Sacra Romana Rota* style of exercising authority by the latter[7] have shattered the confidence among legal scholars that canons of legal reasoning are able to exercise intellectual constraints in addition to serving as rhetorical makers for the dispensation of expertise.

But the problem cuts deeper. An exceedingly high regard is currently paid to emanations of the judicial process. We do not even realize that this is the case, let alone wonder why, because we take for granted that what matters, legally, is what courts do in fact, since that is what we have come to mean by the law.[8] We may even assume this to be legal knowledge's natural state. But there is no such state. Rather, the overwhelming importance of courts reflects scholarship in a state of abdication, that is, at a point where it has already lost faith in its critical mission.

Widespread intellectual apostasy springs, indeed, from the core of the positivistic project whose confidence has been shattered by the realization that one of its most cherished theoretical dogmas has become exceedingly difficult to sustain.[9] The belief in the

[6] *See generally* DIARMUID ROSSA PHELAN, REVOLT OR REVOLUTION: THE CONSTITUTIONAL BOUNDARIES OF THE EUROPEAN COMMUNITY (1997).

[7] Bernhard Schlink, *Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit*, 28 DER STAAT 161 (1989).

[8] *See generally* Holmes, *supra* note 2.

[9] John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 202–03, 218 (2001). Gardner would likely protest at this point and reply that I have just succumbed to one of the myths obscuring legal positivism, namely the belief that legal positivism, qua theoretical claim about the condition of legal validity, carries practical implications for legal interpretation or for allocating the tasks of law application on the one hand and law-making on the other. *Id.* at 222. *But see also id.* at 218–19. Gardner believes that positivism is "normatively inert," by which he means that the position does not provide any practical guidance. *Id.* at 202. All that legal positivism is said to accomplish is to provide an explanation for what it *means* to make a legal claim, by contrast to, for

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availability of "detached" descriptions of normative meanings[10] has been seriously undermined, in one way or another, by hermeneutics[11] or social system's theory.[12] In a manner that is relevant to actual legal knowledge,[13] the positivist project appears to be viable, if at all, only when it is continued—in intellectually distorted form—as a matter of might. The so-called originalism rampant in American constitutional law[14] had long been intellectually exposed for its flaws[15] before becoming increasingly influential on the bench.[16] It needs to be taken seriously for political reasons, but not as a sound theory of constitutional interpretation. Aside from such a positivism of might, it appears as though the project of legal positivism can be carried on, possibly, in the post-positivist format created by Ralf Christensen and his former mentor Friedrich Müller.[17] In this guise it amounts, however, to an inversion of the positivist conception of normative authority, which is no longer deemed to originate from the norm but from the practice governing its interpretation. The positivism of norms becomes thereby supplanted by a positivism of legal language games.

C. Two Readings of Separability

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example, claims of moral rectitude or economic efficiency. *Id.* at 203. Nevertheless, Gardner concedes that even in such an understanding legal positivism can become a premise of hypothetical imperatives. *Id.* at 208–11. He formulates such an imperative for someone who is supposedly under some obligation to find out what the laws of a certain jurisdiction are. *Id.* In such a case, legal positivism would have this person look for the sources. *Id.* This implies that what is in the sources can be described without regard to moral (or any other) merit. *Id.* Hence, even a purely explanatory legal positivist, who is merely interested in uncovering the necessary features of social practices, would have to admit that legal positivism implies further claims about the point of legal knowledge when it plays the role of a premise in a hypothetical imperative: "If I want to know what the law is and if legal positivism is right I had better consult sources and describe what I find therein."

[10] This belief fits even Gardner's remarkably narrow characterisation of legal positivism according to which valid law is valid by virtue of having a source. If it were impossible to ascertain what has sprung from the source and therefore the case that the law would say something new in every case of interpretation we would not be dealing with a source based system of validity. *Id.* at 222.

[11] *See generally* JOSEPH ESSER, VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG (1970).

[12] *See generally* GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (1993).

[13] *See* Gardner, *supra* note 9, at 203, 222 (presenting the project of legal positivism that abstains from carrying normative implications with regard to whether law ought to be applied or made in singular cases and focuses exclusively on explicating on the meaning of legal validity).

[14] *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

[15] For the relevant analysis, see RONALD DWORKIN, A MATTER OF PRINCIPLE 34–57 (1985).

[16] For a remarkable example, see generally *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[17] *See* FRIEDRICH MÜLLER & RALPH CHRISTENSEN, JURISTISCHE METHODIK (10th ed. 2010).

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What is lost in both forms of continuing positivism beyond its end is its original critical edge. The positivism of might may be a convenient tool for the pursuit of political projects. Reversing the image of bindingness may be a good way to take comfort from simply going on with conventional practice. But in neither form is preserved of legal positivism its quality of being a sting in the flesh of complacent orthodoxy.

Legal positivism's critical edge is associated closely with its most salient precept, famously defended by Hart, namely that legal knowledge, in order to be possible, needs to distinguish between law as it is and as it ought to be.[18] This precept, whose import is not terribly clear, can in turn be read as lending expression to what is widely referred to as the "separability thesis." It says that something can be legal even if it is considered to be immoral[19] and that, therefore, what is morally repugnant can be valid law. Morality is not a necessary condition of legal validity.[20] The separability thesis extends to other modes of evaluating norms on their merits, for example, on grounds of either economic efficiency or comprehensibility. Inefficient norms are just as legally valid as regulations that are too complex to make any sense. Positivism, broadly understood, is the belief that the criteria of legal validity are in one way or another self-standing,[21] and only more narrowly conceived does this mean that they contain references to social sources.

In my opinion, positivism's critical edge resides in a certain reading of this general precept. I should like to distinguish two such readings and suggest that it is to be found in the latter.

According to the first reading, the continuing appeal of legal positivism lies in the promise of descriptive accuracy. If social sources matter then consulting them enlightens us as to what the law is, regardless of whether we think that, as a practical matter, we have reason to go forward with the way it is. Owing to the methods associated with legal positivism norm addresses gain access to the law as it is as opposed to what they would like it to be.

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[18] *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615–21 (1958). Gardner, *supra* note 9, at 223, would likely put it differently and state in greater proximity to Austin that the source-based existence of law is one thing while its moral merit or demerit is another.

[19] There is an alternative rendering of the separability thesis saying that necessarily legal validity cannot depend on the moral merit of norms because the authority of law is possible only if it does not overlap with moral authority. I guess that this would be Raz's view, but this should not detain us here. JOSEPH RAZ, 'AUTHORITY, LAW AND MORALITY' IN HIS ETHICS IN THE PUBLIC DOMAIN 226–30 (2d ed. 1995). For a critical analysis that perceives the issue unresolved in Raz's writings, see DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 202.

[20] I hope that the latter formulation would be endorsed by Gardner who made insightful critical comments on the usual characterization of legal positivism as perceiving "no necessary connection between law and morality." Gardner, *supra* note 9, at 222–25.

[21] I add in passing that theorists of functional differentiation would say, at this point, that autonomy of the legal system is manifest in the code legal/illegal. *See generally* Niklas Luhmann, *Law as a Social System,* 83 NW. U. L. REV. 136 (1989); Niklas Luhmann, *Operational Closure and Structural Coupling: On the Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992).

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Legal positivism follows the path of sober description by mapping the law "out there" without overlaying its object with desires or ideals harbored "in here," i.e., within the precincts of one's soul. Legal positivism, thus understood, is the road to truth. The internal link to descriptive accuracy is preserved even in those versions of legal positivism whose point is not to guide legal practice but to account for the structure of concepts explaining the possibility of the existence of shared legal meanings. In this understanding, a positivistic jurisprudence explores the conditions under which law, as a social fact, can exist as an object.[22]

Descriptive accuracy, however, is only one way of understanding positivism's most general precept. Another way consists of engaging in *constructive* efforts that respond to and actively counteract the law's tendency towards self-idealization and self-obfuscation. Arguably, this has been, in the terms of H.L.A. Hart, the "sane and healthy centre" of Bentham's positivism,[23] and the same can be said of Kelsen's project as it is manifest in his critique of "psychologism" or, more generally, in the scrutiny to which he submitted central concepts of public law, such as statehood and sovereignty.[24] Bentham's imperative theory, for example, is an attempt to clarify in most sober terms that law, far from being an embodiment of reason, is an expression of the human will and only of human will. Bentham asserted this view in opposition to how the legal materials are presented in the interpretations of judges, which, in his opinion, were to be mistrusted as notoriously giving rise to mystery and confusion.[25] Legal positivism treats the self-idealizing tendency of the legal materials with suspicion. Hence, it cannot merely describe the law in the boastful colors with which it claims to have authority.[26] Law is not readily available as an object of description. Rather, law must be brought to confess to the grounds and limits that make it possible.

In this respect, legal positivism is similar to American legal realism.[27] Whereas the latter has no qualms about setting aside the normative appearance of legal directives on the

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[22] I concur, on this point, with DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 214–15, and RONALD DWORKIN, LAW'S EMPIRE 33–35 (1986).

[23] H.L.A. Hart, *Bentham and the Demystification of Law*, 36 MOD. L. REV. 2, 8 (1973).

[24] *See generally* HANS KELSEN, HAUPTPROBLEM DER STAATSRECHTSLEHRE ENTWICKELT AUS DER LEHRE VOM RECHTSSATZE (1960); HANS KELSEN, DER SOZIOLOGISCHE UND DER JURISTISCHE STAATSBEGRIFF. KRITISCHE UNTERSUCHUNG DES VERHÄLTNISSES VON STAAT UND RECHT (2d ed. 1928); HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS. BEITRAG ZU EINER REINEN RECHTSLEHRE (2d ed. 1928).

[25] Hart, *supra* note 23, at 3.

[26] No legal positivist who is not completely out of her mind would say that God is the author of a constitution whose preamble states that the constitution was adopted "in the name of God from whom all law originates."

[27] For a classical statement of the demystifying mission of realism, see generally Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 808 (1935). For a useful comparison, see Brian Leiter,

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ground of a comparatively keener interest in exploring how things are actually done, the more appealing versions of legal positivism attempted to retain law's normativity by lending it a morally sobering construction. Rendering law normatively intelligible by moving beyond its naive, moralistic or ideological self-presentation has always been the distinguishing mark of *constructivism*.[28] Legal positivism is a particularly skeptical member of this intellectual family. Hence, arriving at law "as it is" as opposed to as it "ought to be" implicates suspicion vis-à-vis the legal materials themselves. It may require constructing conditions of legal validity of which the participants in legal practice may not have been aware, such as the *Grundnorm* or power-conferring norms explaining the validity of a judicial decision, which is believed to be law by the judge and her peers on the grounds of its merits.

If there were a point in doing so, one could argue that Kelsen's legal theory comprises both readings of the legal positivism project and that these remain, ultimately, irreconcilable. But this is not what I would like to explore here. Instead, what I would like to argue is that the spirit of legal positivism can be rescued for a different age once the first reading of its mission is revealed to fall short from the perspective of the second.[29] In other words, I would like to demonstrate that the *spirit* of legal positivism resides in *positivism as constructivism*. In this form, it can be preserved even for an age that has come to reject *positivism as descriptivism*.

D. The Hartian Persuasion

In order to arrive at this conclusion I am going to take a detour. It is necessary, in particular considering that I intimated at the outset that legal positivism appears to be dead. But this cannot be right.[30] I must have ignored that there exists a strong school of legal positivism which is very much alive and kicking. I will refer to this school as the "Hartians," taking my cue from the name of the eminent scholar whose written work has been accepted as the gospel by its members.[31] Membership in this circle—or, put

Legal Realism and Legal Positivism Reconsidered, 111 ETHICS 278, 301 (2001) (providing a discussion that focuses almost exclusively on the legal positivism of H.L.A. Hart).

[28] Rudolph von Jhering, 2.2 DER GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG 385 (5th ed. 1899); s*ee generally* Stanley L. Paulson, *Hans Kelsen's Earliest Legal Theory: Critical Constructivism*, 59 MOD. L. REV. 797 (1996).

[29] It is, of course, possible to argue, from the perspective of the first reading, that legal positivism needs to reject a second reading that is inconsistent with the first.

[30] In fact, readers may already wonder whether I have already prepared letters of apology to be sent to members of Balliol and University College at Oxford.

[31] For a highly useful and authentic introduction into the outlook of Hartianism, see Jules L. Coleman & Brian Leiter, *Legal Positivism, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 228–48 (Dennis Patterson ed., 2d. ed. 2010).

differently, Hartianism as genre[32]—is mediated by five beliefs. First, through joining the Hartians one becomes a legal positivist. Second, H.L.A. Hart was the greatest legal philosopher of the twentieth century.[33] Third, the Hart-Dworkin debate is of central importance for legal theory (even though there has never been a written exchange between the main protagonists).[34] Fourth, Hart eventually won the debate, even though Dworkin would not learn about this defeat before the posthumous publication of Hart's postscript in the second edition of A CONCEPT OF LAW. Fifth, intellectual progress in legal theory can only be made by standing on the shoulders of Hart.[35]

Lest I be misunderstood, I would like to clarify that I consider Hartianism a wellspring of erudite analytic legal philosophy. In other words, studying Hartian scholarship is an excellent way of taxing one's brain. This intellectual fitness aspect notwithstanding, I argue that the Hartians present us with is at best a very lame version of legal positivism.[36] I suspect that they even pride themselves in lacking critical practical edge.[37] Of course, while there is nothing wrong with producing a good boy/nice girl variety of legal theory, it is doubtful whether Hartians are not thereby selling the positivist project short.

The Hartian persuasion is culturally inward-looking. This feature may well be a resonance of its gestation period. Hartianism, which American scholars most religiously adhere to,[38] gained momentum during the end of the twentieth century when America seemed to be

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[32] The allusion is, of course, to John Gardner, *The Legality of Law*, 17 RATIO JURIS 168, 171 (2004), in which law itself is characterized as a genre.

[33] *See, e.g.*, Matthew H. Kramer, *Introduction, in* THE LEGACY OF H.L.A. HART xiii (Matthew Kramer et al. ed., 2008) Without denying Hart his share of greatness, this is a bold claim to make, given that Hart competes in such a contest, questionable as it is, with the likes of Hans Kelsen, Karl Llewellyn, or Carl Schmitt (I do no dare say Ronald Dworkin).

[34] *See, e.g.*, Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed, in* RONALD DWORKIN 22–25 (Arthur Ripstein ed., 2007) (providing an example of the centrality of the debate); MATTHEW H. KRAMER, IN DEFENCE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMING 128–92 (1999) (same).

[35] The latter is clearly reflected in Shapiro's attempt to arrive at a legal theory by answering questions that were only unsatisfactorily addressed in Harts work. *See* Scott J. Shapiro, *What Is the Rule of Recognition (and Does it Exist)?, in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 250 (Matthew Adler & Kenneth Einar Himma eds., 2009) (undertaking to amend the house that Herbert built by developing a theory of "plans"). This article is supposed to answer a number of objections that have been made against Hart.

[36] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 188, 198 (finding that the Hartian approach is not a version of positivism at all).

[37] Gardner, *supra* note 32, at 174–77; *see also* DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 211 (providing a related observation regarding Hartianism).

[38] Among the most distinguished members are Jules Coleman, Kenneth Einar Himma, Matthew H. Kramer, Scott J. Shapiro, and Wilfrid J. Waluchow. I submit, however, that it is difficult to apply the rule of recognition for Hartianism as an outsider.

setting the standards for the rest of the world. For Americans of that generation, H.L.A. Hart was the only legal positivist whose work was somewhat congenial to their own cultural ways. Therefore, it made much sense for them to seek guidance from him. What is quite exceptional about Hartianism, nonetheless, is the fact that what is written about, or in the spirit of, Hart has been quickly turned into an industry whose products are disseminated in various forms: handbooks, monographs, and a prominent legal periodical.[39] Even more remarkable than these outward manifestations is the unprecedented subtlety and analytical rigor with which Hartians not only go about expounding the work of the master but also develop amendments to the edifice.[40] For example, the Hartians distinguished between inclusive and exclusive legal positivism, a distinction that has quickly become part of the standard inventory of legal theory textbooks.[41] Lest I be misunderstood, I add that the wider circle of Hartians is not composed of legal positivist alone; even the non-positivist among them take Hart as having formulated the most defensible version of this position.[42]

The high level of sophistication that Hartian scholarship brings to bear on the interpretation and defence of Hart ostensibly (or maybe even "ostentatiously"?)[43] exceeds the subtlety of the master. Since I cannot, for the purposes of this exposition, even attempt to do justice to the various denominational instantiations of the common faith, I should like to focus on the work of the eminent scholar whose role among the whole group is, in a sense, most adequately described as that of the Hartian in Chief. Whom I have in mind, of course, is Jules Coleman whose work on inclusive legal positivism ranks among the outstanding contributions to the jurisprudence of our time.[44]

[39] The important periodical is *Legal Theory*. The monographs are virtually countless, and the flagship publication is THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott J. Shapiro eds., 2002).

[40] *See generally* Shapiro, *What Is the Rule of Recognition*, *supra* note 35.

[41] *See, e.g.*, BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 123 (2004) (providing the distinction). Shapiro, *The "Hart-Dworkin" Debate*, *supra* note 34, at 53 (same); *supra* note 39 (providing references to the literature).

[42] For example, Brian Leiter, who is not a legal positivist, believes that, in contrast to Hart's theory, Hans Kelsen's theory is out of step with developments in modern philosophy. Brian Leiter, *Michael Gree and Hans Kelsen Redux*, (October 6, 2007), http://leiterlegalphilosophy.typepad.com/leiter/2007/10/michael-green-a.html.

[43] *See* HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (2d ed. 1997) (discussing covert patricide as stimulus of literary production).

[44] *See generally* JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001) (representing a monographic exposition of Coleman's legal theory).

E. Conventionalism

When in the course of one of the heated debates of the 1920s Hans Kelsen remarked that natural law theory merely disguises the "Gorgonian face of power" that one had better expect to encounter underneath all more idealized appearances of law,[45] he pointed most drastically to positivism's sobering mission. Where participants in the legal system would have us perceive good reasons and sound judgment it is the task of the positivist to unearth asymmetries of power and choices that are made, potentially, to the detriment of opponents. In this understanding, the thrust of separability is epistemological as well as sociological. In eliminating moral criteria from the construction of legal validity, the theory intends to bring to the fore what truly constitutes law, namely, either the legally authorized or merely the effective exercise of power. Positivists would not deny that moral justification is the requisite accompagnato thereto. But it needs to be turned off, as it were, in order to see what is really going on.

No ambition could be farther removed from Coleman's project.[46] Indeed, at the heart of his theory lies the attempt to make sense of the seemingly paradoxical claim that it is consistent with legal positivism to see the validity of at least some legal norms depend on moral criteria.[47] Coleman defends an extremely accommodating version of "inclusive" (or "soft") legal positivism, which would permit as part of the rule of recognition even a condition saying that laws necessarily have to be defensible from a moral point of view.[48]

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[45] HANS KELSEN, 3 VERÖFFENTLICHUNG DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 54, 55 (1927).

[46] Since Hartians do not share this ambition they neglect the critical import of constructions arrived at by more advanced forms of legal positivism. Repeatedly, Kelsen is reprimanded by Shapiro for arriving at a counterintuitive concept of the legal norm that conceives of it as primarily addressed to the law-applying official whose duty it is to impose a sanction. HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 26–30 (trans. Bonnie Litschewski Paulson & Stanley L. Paulson, 1992); Scott J. Shapiro, *The Bad Man and the Internal Point of View*, *in* THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES JR. 199, 204 (Steven J. Burton ed., 2000). By insisting against Kelsen that Hart's "puzzled man" is to be guided by legal rules Coleman ignores the demystifying potential of Kelsen's construction, which reveals that legal systems can operate with disregard for how laypersons understand norms. H.L.A. HART, THE CONCEPT OF LAW 40 (2d ed. 1994). I wonder whether Kelsen's account is not sociologically more accurate than a legal theory that takes intuitions about guidance by laypersons uncritically for granted. Not only is it the case that the puzzled man usually is the muzzled man; the insistence on the "puzzled man" obtaining guidance from rules is inconsistent with Hart's belief that law exists only where there is unity of primary and secondary rule. The "puzzled man" resides the pre-legal sphere governed by primary rules.

[47] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 67, 109–10. The paradox has been duly noticed by DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 189.

[48] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 112, 126. Of course, Coleman needs to struggle at this point with re-establishing the authority of law vis-à-vis moral authority. He attempts to do so by reintroducing the power of someone to establish for ordinary folk what, according to moral standards, is law. He thereby likens his position again to "exclusive" legal positivism. (130, 141). Legal positivists, who, as Gardner, note 9 at 200, reminds us, believe that all legal norms are posited and hence come into this world as a result of acts, find it quite difficult to make sense of the idea that some laws might be void *per se*, regardless of whether the voidness is

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It cannot come as a surprise, then, that the core of legal positivism is not believed to be captured by separability, however understood, but rather in the puzzling claim, incidentally attributed to all contemporary legal positivists,[49] that the criteria of "legality"[50] are a matter of conventional social facts.[51] Conventional criteria for the set of social facts that we call law lay the ground for the law's existence. They are applied in a customary judicial test of legal validity.[52] According to Coleman, this belief defines the core of legal positivism.[53]

The criteria of legal validity are believed to be components of what Hart introduced under the name of "rule of recognition."[54] As a convention, this rule depends on being practiced in order to exist and to be authoritative for legal officials.[55] The existence of this rule explains how legal systems are possible without thereby indicating why any such system is also desirable.[56] The rule exists, socially speaking, if and only so long as it is practiced. The rule is practiced if and so long as it is applied from an internal point of view.[57] This means

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alleged to follow from immorality or illegality. See Hans Kelsen, *Reine Rechtslehre* (2d ed., Vienna: Deuticke, 1960) at 280.

[49] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 68–69, 75.

[50] By "legality" Coleman means what is to be counted as law is therefore capable of partaking of legal validity. *See also* Shapiro, *What Is the Rule of Recognition*, *supra* note 35, at 240.

[51] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 152, 161. It may bear emphasis that the criteria for what might partake of legal validity are different from the criteria that account for the existence of a legal system, such as the unity of primary and secondary rules or the existence of legal officials. Gardner, *The Legality of Law*, *supra* note 32, at 170.

[52] HART, THE CONCEPT OF LAW, *supra* note 46, at 256.

[53] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 161.

[54] HART, THE CONCEPT OF LAW, *supra* note 46, at 256.

[55] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 77. Coleman believes the rule of recognition to be a duty-imposing rule, however, only on legal officials, whereby the duty itself is only incidentally related to law, for it arises from participation in a common enterprise and is a special case of an associative obligation (77, 85, 95, 97, 159-160). The duty imposed by the rule of recognition can therefore never be a legal obligation and is not addressed to "ordinary folk" (139).

[56] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 71, 93, 118; HART, THE CONCEPT OF LAW, *supra* note 46, at 257.

[57] *See* COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 76, 86 (noting that the sloppy characterisation of a social rule as a combination of a pattern of convergent behaviour *plus* internal point of view is flawed). The flaw goes back to Hart. HART, THE CONCEPT OF LAW, *supra* note 46, at 255. One cannot, as a matter of judgement, ascertain convergent behaviour without adopting *a* point of view in the most elementary sense of discriminating between and among instances of a pattern. In this respect, a point of view is adopted *vis-à-vis all others* who are also engaged in making out regularities without being actively engaged in bringing them about. The difference between such a point of view, which is manifest in the exercise of what Kant would have called "reflexive judgement," and what Hart calls the *internal* point of view, which is relevant for social rules, lies in the fact that

that those participating in its application adopt a critical reflexive attitude towards compliance and non-compliance.[58] Convergent behavior would be socially beyond recognition *as* rule-following if it were not perceived as implicitly constituting itself as instances of following the rule.[59] This explains, I add in passing, why law is constituted by legal knowledge, a point to which I shall return below.

If the law, as a system,[60] avails of a center, then this place is occupied by the rule of recognition,[61] for "it makes determinate which rules bear the mark of legality" and "creates a duty for a certain class of individuals—officials—to evaluate conduct under the set of primary rules that bear that mark."[62] The social constitution of this rule is invariably circular. The officials who apply it and are constituted by it in this capacity must be guided by it[63] in order to be subject to its authority.[64] What the rule means in fact is affected by

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the elements of the pattern are themselves treated as instances of rule-following. They are distinct from mere occurrences for which one tries to reconstruct a pattern. Hence, a point of view is applied not towards others who are also engaged in trying to make out a pattern themselves but to whatever appears to be like an instance of the pattern. Potential instances of the pattern are interpreted to be instances of rule-following. The critical reflexive attitude is directed at the claim that is attributed to them, namely, the claim to be cases of following a rule. Social facts are thereby read as involving implicit claims whose validity is put to the test. Only thus understood, the following statement by Coleman makes sense: "A social rule exists when convergent behaviour is conjoined with a critical reflexive attitude towards that behaviour. The critical reflexive attitude is the internal point of view." COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 82.

[58] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 88–89; HART, THE CONCEPT OF LAW, *supra* note 46, at 86.

[59] The rule exists only if there is widespread acceptance of the internal point of view. COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 83, 153. I spare readers a discussion of the delicate question whether the reconstruction of social rules from an external perspective merely suspends the application of the critical reflexive attitude towards what it treats as instances of the rule but nonetheless extends it to those engaged in the same hermeneutic exercise. Alas, the application of a critical reflexive attitude on the part of those engaged in an external and theoretical description of a social practice is absent in the otherwise highly useful discussion by Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1160–61 (2006).

[60] The belief that law is a system was most certainly held by Hart. Gardner, *The Legality of Law*, *supra* note 32, at 170.

[61] Shapiro, *What Is the Rule of Recognition*, *supra* note 35, at 246.

[62] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 139. The rule of recognition is only a necessary, but not a sufficient condition for law, which also requires obedience by "ordinary folk" for its existence. *Id.* at 76.

[63] It is not infrequently said that the rule of recognition must be "accepted" by officials. Shapiro, *What Is the Internal Point of View?*, *supra* note 59, at 1159; Shapiro, *What Is the Rule of Recognition*, *supra* note 35, at 245. But this broad formulation obscures an important difference. Officials must accept that their behavior has to be intelligible and defensible as "rule-following." But it is not necessary that they accept the rule substantively. *See* HART, THE CONCEPT OF LAW, *supra* note 46, at 255 (noting that rules must be accepted (merely) *as* guides of conduct and criticism). *See* Shapiro, *The Bad Man and the Internal Point of View*, *supra* note 46, at 202 (getting it right by saying that officials must be "committed to following" the rule). But they need not accept it as such and not, of course, on its merits. Participants in the practice are therefore able to answer questions about how one plays by the rules. They are not necessarily able to answer questions about whether playing by the rules is useful and good. With this distinction, many conceptual monstrosities can be avoided, for example, the "detached attitude"

their conception of the rule's meaning, which they imagine to be independent of their arriving at such a conception. Their voluntary compliance and their critique of the behavior of others must be informed by something that is independent of, and distinct from, various individual interpretations or manifestations of the rule in single cases.[65] Authoritativeness as a rule is possible only if the rule is more than the sum total of its applications and therefore, in a sense, something over and above them.[66] In Coleman's words, this means that "[i]n order for . . . behaviour to constitute a *practice* in the relevant sense, it must reflect a shared grasp of the rule . . . ."[67]

F. The Elusive Convention

Expositions that are intended to state what the rule really requires are arrived at from the internal point of view. But reasonable people may come up with reasonably different answers to this question. Arguably, the rule of recognition of European Union law says, among other things, that fundamental rights emerge from the common constitutional traditions of the Member States. Conceivably, it can be disputed whether this component of the rule means that the existence of a right in the constitutional law of two Member States is sufficient to constitute a common constitutional tradition.[68]

Coleman would explain that the convention exists as long as officials agree on the content of the rule in the abstract[69] even though they may disagree about its application. He claims the following:

> Judges may agree about what the rule *is* but disagree with one another over what the rule *requires*. They

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or the relative moral authority of the legal point of view Shapiro, *What Is the Rule of Recognition*, *supra* note 35, at 259. Nonetheless, Patterson insists correctly against Hartians that what has to be accepted as rules by officials in order to be in the position to arrive at judgments about rule-following are "forms of argumentative appraisals," such as methods of interpretation. Dennis Patterson, *Explicating The Internal Point of View*, 52 SMU L. REV. 67, 73 (1999). Interestingly, Patterson, in turn, is not heeded of the fact that, just like explorations of the rule's merit, appeals to sound methods of interpretation mark the point at which mere conventional practice is exited. I surmise that these matters could be further elucidated from a background that is conspicuous by its absence in Hartianism, namely action theory. It is possible to conceive of participants in the practice as improvising actors in the sense envisaged by Velleman. *See generally* J. DAVID VELLEMAN, HOW WE GET ALONG 12–14 (2009).

[64] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 78, 82, 95, 134.

[65] DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 198.

[66] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 80.

[67] *Id.*

[68] Case C-144/04, Werner Mangold v. Rüdiger Helm, 2005 E.C.R. I-9981.

[69] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 192–93 (discussing the convention).

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> could not disagree in every case or even in most cases, since such broad and widespread disagreement would render unintelligible their claim to be applying or following the same rule.[70]

This statement is very confusing because it involves an equivocation. The token is what they can agree on (for example, "All are to be treated equally"), but what matters, as Coleman's reference to "widespread agreement" indicates, is the type (i.e., who counts as equal). It is because of the equivocation of token and type that Coleman can claim that "some disagreement about a rule's requirement is not incompatible with the rule's conventionality."[71] Token conventionality, however, is a useless guide. It cannot coordinate conduct, which explains why type conventionality is what Coleman is truly after by implicitly referring to agreement in the majority of cases. Not that we should find it disturbing that Coleman cannot quantify here. The major point is that in controversial cases mere appeals to conventions cannot do the work.[72] The critical reflexive attitude is directed at how rule-following is done and not what the rule is about. When a community has been thrown out of agreement about how things are done a convention is no longer of any avail.

Coleman is aware of the problem and claims that the rule of recognition is a result of "ongoing negotiations" and "a framework for bargaining how to go on"[73] or, more generally, a shared cooperative activity,[74] which involves reason-giving. Coleman believes to believe that the ground of legal validity is the rule of recognition. But what he believes, in fact,[75] is that there is a practice of exchanging arguments in which claims are made, as a conventional matter, that x is law because it has been previously recognized as law. But this does not mean that the connection between x and prior cases is governed by a convention. Merely the *appeal* to the purported connection is conventional. Coleman ends up reducing the conventionality of the rule of recognition to the conventionality of appeals to its components. We may find it easier to talk to one another when, we refer, as a matter of course, to the constitution. This does not mean, however, that interpretations

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[70] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 116.

[71] *Id.*

[72] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 190 ("Convention is built on consensus, not disagreement. . . . When a group of people disagrees about what behaviour is required or appropriate, it seems odd to say that they have a convention that decides the issue.").

[73] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 99–100.

[74] *Id.* at 96–97.

[75] *See* STANLEY L. FISH, DOING WHAT COMES NATURALLY 471–502 (1989) (formulating a similar objection against Hart).

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of the constitution are thereby governed by a convention. Coleman conflates "we conventionally appeal to x" with "x is determined by convention."[76]

G. The impasse

In order to rescue conventionality, Coleman drives a wedge between the rule itself and the controversies over what the rule requires in single cases.[77] Because the rule of recognition is supposed to be a conventional rule any conception of it, even though invariably involved in its application and evolution, must be intrinsically self-effacing. The convention is supposed to exist even where disagreement has arisen over what it truly requires.[78] It can only exist, therefore, when it is possible to sever it somehow from accounts of its meaning. Paradoxically, however, the severed convention cannot exist unless a critical reflexive attitude is considered to be manifest in its constitution.

It is a convention that fundamental rights of EU law have their source in the common constitutional traditions of the Member States. It is left open, however, what it takes to have such a tradition. What matters are applications that flow from the internal point of view in one case or the other, but not how they are rendered *intelligible* as instances of rule-following from this perspective. They ought to be looked at as *mere* instances of practice.

But, if applications are dissociated from how they can be accounted for *as* applications of a rule, they can also no longer count as instances of practicing a rule.[79] A rule exists only as reflected in its application and from one application to the next from the perspective of the connections that the present establishes with the past. The past can govern the present only if the present allows itself to be governed by the past in the future.[80]

Conventionalism encounters an impasse here. According to Coleman, the content of the rule of recognition must emerge from a "pattern"[81] of behavior that one observes, as an

[76] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 195–96 (observing correctly that shared co-operative activities are not necessarily conventional).

[77] *See generally* COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44.

[78] *Id.* at 116; *See* DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 190 (providing perceptive critical observations).

[79] Here is how Coleman states the matter: "It is the shared attitude toward the pattern of behaviour that constitutes the fact that the behaviour is governed by a rule." COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 79. The formulation suggests that there is a pattern which is somehow joined by the internal point of view. But this cannot be the case. Elements of a pattern can only be relevant for the rule when it is integral to their meaning to be followings of the rule. *Supra* note 57.

[80] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 80.

[81] *Id.* at 91.

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official, in others and oneself. The pattern says that in order to establish the existence of a fundamental right of European Union law, appeals must be made to a common constitutional tradition. Unfortunately, as we have seen, the mere appeal to the convention does not give one the convention itself. Reasons of political theory must not be decisive either, for they would introduce considerations of the merits of one or the other substantive conception of that rule, as a result of which legal validity would no longer be a matter of social fact.[82] Likewise, considerations regarding the right methods of interpretation would, by virtue of what is claimed by them, transcend the purview of the conventional.

H. The Form of the Rule of Recognition

The discussion has revealed that it is difficult to imagine how, in cases of doubt, the internal aspect of rules (the critical reflexive attitude) can be worked into conventions with regard to the rule's substance. Because questions of interpretation cannot be settled with regard to settled practice, conventionality is likely to be transcended by appeals to methodological accuracy or moral correctness.

It cannot be ruled out, however, that the question admits of a more satisfactory solution from a social perspective. The distinction between the substantive and the social dimension is straightforward. What is of interest about rules, substantively considered, is what they *require*. What matters about them, socially, is whether their application would be supported by *consent*.[83]

If the *pattern* itself matters, and not a statement of what the rule is over and above its applications, then all that is needed in order to hit the convention is to trigger nodding among one's peers. Vis-à-vis "ordinary folk" (Coleman's genteel characterization of lay persons), who might react with bewilderment when they learn that two Member States' constitutions are sufficient to constitute a common constitutional tradition, one stands vindicated as long as the peers, when confronted with such a finding, nod and mutter "This is what *we* do." Is not this, if anything, the point of having a convention? "This is what we do" and "I do as all others do" comprise the *form* of stating the rule's social dimension from an *internal* point of view.[84] Had Coleman studied George Herbert Mead, it would

[82] *Id.* at 161.

[83] NIKLAS LUHMANN, 1 RECHTSSOZIOLOGIE 99, 105 (1972).

[84] Such social perspectives are still consistent with the standpoint that Shapiro characterizes, misleadingly, as "rule acceptance" or "internalization." Shapiro, *What Is the Internal Point of View?*, *supra* note 59, at 1159; Shapiro, *The Bad Man and the Internal Point of View*, *supra* note 46, at 200, 208. It is misleading, for what matters for the internal point of view is one's performance as a competent rule-follower. Even—or maybe even in particular—hypocrites can be perfect rule-followers. I mention in passing that Hart's distinction between the external and the internal aspect of rules is remarkably difficult to square with his conventionalism. HART, THE CONCEPT OF LAW, *supra* note 46, at 55–56, 86. The external aspect of rules captures general regularity of conduct,

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have also occurred to him that, thus understood, conventional rules are means of exercising social control over individuals.[85] Conventionalism would arrive at the conclusion, hence, that the right determination is that which would have been arrived at by any other official whose intellectual demeanor exhibits all the marks of what it takes to play the game skillfully.[86]

Remarkably, the comparison usually drawn in this context with regard to (mere) coordinating conventions[87] creates the impression that this is the immediate and natural rendering of the internal point of view whereas more elaborate substantive conceptions of what is takes to apply a rule correctly are mediated by interpretation and, for that reason, more artificial. But the contrast is misleading. Mere coordinating conventions, such as the convention to drive on the right side of the street, are not likely to be susceptible to much interpretative elaboration, while elements of a purported rule of recognition are. Hence, the conventionalism of nodding peers is possible only when broader interpretative or justificatory appeals are avoided or suppressed against the backdrop of some permissive consensus which signals to peers that peers will react with "yeah" to whatever is done by peers simply because they are who they are. It would be wrong, therefore, to assume that peer-group conventionalism is logically or historically prior to the interpretative elaborations of any justificatory appeal to the rule of recognition; rather, conventionalism is based on denying them relevance for a practice in which peers benefit from being able

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which is accessible even to an outside observer. The internal aspect is something that can be had by a rule "in addition" to the external aspect. *Id.* at 55. It is manifest in people "having views" about what it takes to play by the rules. *Id.* at 56. Because in the case of a convention these views have to have observance of a pattern of conduct as their point ("Now, you do as all others do!") the external aspect is of overwhelming relevance for engaging the critical attitude from the internal point of view. *Id.* at 55. What would it take to "have views" as regards conventions? One would have to come up with educated guesses about how peers will be judging one's application of the rule, for if that were not decisive it would not be a convention ("This is what we do"). Conceivably, a lawyer with training in American constitutional law would approach an equal protection problem by first asking which level of scrutiny has to be applied. However, if she were to do so in the context of Austrian constitutional law she would be reproached by her Austrian peers claiming correctly that this is not the way things are done around here ("This is not what we do"). The internal point of view states what can be observed from the external point of view and asserts it as a matter of right. The difference between the internal and the external aspect is not whether one anticipates reactions from a pattern or, even more intelligently, one anticipates how peers believe all other peers to believe the pattern to be projected into the future, but whether one does it as a member of the group or as an outsider. Only as an insider you get away with saying "This is what we do" and do not have to worry much about doing as all others do. Then one is in a position to use as a reason for decision what one anticipates to be the reasoning of all others. *Id.* at 102; CARL SCHMITT, GESETZ UND URTEIL (1912) (reconstructing this exact conventionalism).

[85] GEORGE HERBERT MEAD, THE PHILOSOPHY OF THE PRESENT 190 (A.E. Murphy ed., 1932). Had Shapiro read Mead he would have likely explicated his "plan" theory of legal practice in the terms of a "game." GEORG HERBERT MEAD, MIND, SELF, AND SOCIETY FROM THE STANDPOINT OF THE SOCIAL BEHAVIOURIST 153–54 (1934).

[86] SCHMITT, *supra* note 84, at 71.

[87] Hart believed the rule of recognition to be a coordinating convention. For a critical analysis, see Andrei Marmor, *Legal Conventionalism*, 4 LEGAL THEORY 509 (1998).

to claim that what *they* do is endorsed by others as epitome of what *we* do. This is a quite artificial arrangement.

I. Going with the Crowd

The point of conventionalism is to see emerge from already existing common activity an obligation to carry on with it.[88] The manner in which this activity is accounted for, from the internal point of view, avoids broader justificatory appeals. It is accepted by officials as a social rule for a variety of reasons, among which might figure the interest to earn a living, the desire to impress one's spouse or, according to Hart, "the mere wish to do as others do."[89] The rule is accepted as a standard of conduct from an internal point of view that is indifferent to the substantive reasons of universal acceptability. This is written on the face of statements of the "this is what we do" variety, for, as had been famously recognized by Wittgenstein, substantively they point to "something indeterminate" (*etwas Unbestimmtes*).[90] If they did not they would merge into conceptually more refined accounts of the underpinnings of what we do. Therefore, the criteria relevant for exercising the critical reflexive attitude need to focus on something else, which might explain how an intellectually reticent practice can continue and arrive at a synthesis over time.

The key to finding the answer is that what one does matters less than who one is. In other words, the practice is easily possible under asymmetrical conditions.[91] While one group, call them the "boys", calls the shots and gets away with saying "This is what we do" the up and coming or the weaker members of the group, call them the "pack," adapt, resort to ducking and follow the maxim "I do as others do." This pair of maxims is the essence of conventionalism.[92] Interpretations of the rule are determined by what members of the pack guess will trigger nodding on the part of the boys because it reflects their intuitive

[88] DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 197.

[89] HART, THE CONCEPT OF LAW, *supra* note 46, at 203, 257.

[90] LUDWIG WITTGENSTEIN, ÜBER GEWISSHEIT 125 (1984). Coleman underscores that the internal point of view towards a rule is different from the application of the reasons underpinning the rule in the first place. COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 89.

[91] It is quite amazing that Hart and the Hartians always imagined the "group" to be egalitarian. How can one assume that in the *legal* system—vis-à-vis courts—criticism is taken seriously or even to be legitimate? *See* DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 196 (hinting, quite correctly, at the fact that it is empirically doubtful whether the relation among members of the United States Supreme Court can be described as a shared cooperative activity). *Contra* Shapiro, *What Is the Internal Point of View?*, *supra* note 59, at 1164.

[92] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 91–92.

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grasp of the rule.[93] Consequently, the rule of recognition can be a conventional rule only as long as the pack does not speak up, at any rate not too frequently, and reacts to the boys' piqued rejoinders in an apologetic way ("Thank you, now we have got it!").[94] The type of normativity that goes into creating the obligation to go on reflects the desire to follow the crowd.[95] Going along may carry the reward of being one of the boys tomorrow and of occupying the position, eventually, where one is free to assert, "This is what we do."

J. From Addition to Quaddition

At this juncture, it is possible to appreciate more fully what it means that the rule of recognition is a social rule. What matters about rule-following is that the activity in question is a specimen of social action[96] and not some intellectual operation mastered in the chambers of court. How one gets along with others is more important than what one does. Being a proficient member of the group that Hart and Coleman refer to as "officials" requires social skills, and they are that which is relevant from the internal point of view. One does not openly criticize high courts for reasoning mistakes. One does not raise embarrassing "theoretical" questions to which no one has an answer. One tries to go along even when one cannot make sense of what others do. These matters reflect, at any rate, the most elementary experiences that are made in the course of being socialized into a member of the pack. In the eyes of students, professors are boys (even if they are female). What students attempt to do, using their social internal point of view, is imagine

[93] This is not to say that members of the pack take their guidance from boys directly: They apply the rule as they believe it to emerge from the boy's internal point of view. Shapiro, *The Bad Man and the Internal Point of View*, *supra* note 46, at 206.

[94] This desire may be grounded in the expected reward to become bigger than one is when one is going with the crowd. FRIEDRICH NIETZSCHE, THE DAWN OF DAY 32–34 (trans. J.M. Kennedy, 1964).

[95] It is quite remarkable that in his critique of Austin's concept of legal obligation Hart shifts the focus from avoiding coercion towards avoiding rebuke for not going along with the crowd. *See* HART, THE CONCEPT OF LAW, *supra* note 46, at 84 ("Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great."). It is consistent with this understanding of obligation that the internal aspect of rules rests on the complementary maxims of "This is what we do" and "I do as others do," respectively. There is no reason, of course, why one would not be "obliged" by social pressures of conformity even if they were not backed with coercion. The critique that Hart has of Austin can be easily carried over to Hart himself. Why should the prospect of being shunned and rebuked by, say, members of the Tea Party Movement give rise to an obligation on my part to join the ranks of the radical right even if the large majority of Americans were to support the movement? What matters for the application of the rule of recognition is not the acceptance of the rule but rather the social skills necessary to *pass* as member of the pack. Any real acceptance of social rules as obligatory would have to be based, by contrast, on the desire to be part of the group, for it is through identification with the group that one can come to consider deviation from its norm as a threat to one's identity. CHRISTINE A. KORSGAARD, THE SOURCES OF NORMATIVITY 102 (1996).

[96] *See* MAX WEBER, SOZIOLOGISCHE GRUNDBEGRIFFE 42 (5th ed. 1981) (explaining this activity as an action that is in some manner heeded of the action of others).

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what conceptions of rule and doctrines the professors might have in mind when talking about cases. Thereby they arrive at guesses about the professor's substantive internal point of view from their social internal point of view. This is what they do because they have chosen to do as others do. The only interesting part of this story is that they need to make sense even of professors who, using Kripke's famous example, mistakenly assume to carry out additions while they in fact perform "quadditions."[97] Professors who believe in their own brilliance are often indeed incoherent. Students, nevertheless, need to make sense of their conduct as instances of a rule and trail their conduct in order to perform successfully in front of them an operation having the form "This is what we do."

The undefeated champions of quaddition are courts. In fact, having them occupy this position is the essence of common law. The idea of the rule of recognition as social rule matches this situation. The court says that two Member States constitutions are sufficient to constitute a constitutional tradition. In such a situation, it would be *wrong* to criticize the court for either having misapprehended the law or for engaging in judicial legislation. Whoever is guided by the rule of recognition is also governed by it. Once the decision has been made, governance impacts guidance. The decision creates a new situation. The law is no longer what it had been before.[98] All efforts to come up with *substantive* renderings of the rule from an internal point of view are thereby thwarted from the *social* internal perspective.

This explains why the common law tradition remains at odds with the constructive legal scholarship. A new case changes everything. This is what we do. It should not come as a surprise that the intellectual malaise brought about by such a system comes wrapped up in rhetoric suggesting that persistent confusion is the mere surface manifestation of how the law accumulates experience and increases its wisdom.[99]

K. Idealization and Disguise

The pair of statements "This is what we do" and "I do as others do" indeed provides access to two different perspectives of the internal point of view whose application enters into

[97] *See generally* SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982) (discussing rule-following and introducing the example of someone who adds numbers and instead of adding one after the other at a certain points begins adding more than one number). From the perspective of an observer who tries to infer the rule from behavior, this rule turns out to be not the rule of addition but of something slightly different, for example, "quaddition," which does not use "plus" but "quus" as its operator. *Id.*

[98] Gardner, *The Legality of Law*, *supra* note 32, at 175.

[99] For an extremely useful account of the mentality of the Common Law tradition, see GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986). His account of the common law mentality has recently been complemented by the following articles: Gerald Postema, *Classical Common Law Jurisprudence (Part 1)*, 2 OXFORD UNIV. L.J. 155 (2003); Gerald Postema, *Classical Common Law Jurisprudence (Part 2)*, 3 OXFORD UNIV. L.J. 1 (2003).

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the constitution of the rule of recognition as a social rule. The internal point of view is, to repeat, the "important capacity . . . to adopt a practice or pattern of behavior as norm."[100] The way in which the boys use the rule brims with self-confidence: "This is what we do," "This is how it's done," "Here you have it." The critical reflexive attitude exclaims, "Don't you dare." Members of the pack, by contrast, use a more cautious form: "They are out to lunch, but perhaps that is what they mean." The critical question is: "What would I say if were one of them?" Of course, the relation between these forms is dialectical. Brimming self-confidence may be dampened by the concern that too much audacity risks losing one's boyhood. One must not create an opportunity to be easily dismissed as senile or whacky. On the other hand, one could never advance from the pack to the boys if one never tried one's hand at acting like one of them.

Interestingly, Hartian conventionalism hides from us these simple truths about how social conventions work. It misses important points about the conventional existence of law, for example, what it takes to elaborate the rule of recognition's social nature. Such a view of the internal aspect would indeed reveal that it is empowering to play by rules that have been laid down by others and not to ask too many questions, in particular not those questions that boys would be too embarrassed to answer; that it pays to be cooperative and to show off one's smarts, but not in an impudent way; that it is advantageous to profess belief in the greatness of the legal enterprise; that one had better dodge substantive constitutional issue in the course of Supreme Court confirmation hearings (the Bork problem).

Remarkably, Coleman's eventual rendering of the rule of recognition, qua practice, as a form of shared cooperative activity[101] does not include any discussion of the complementarity of "This is what we do" and "I do as others do." On the contrary, his account of practical activity, for which he draws on Michael Bratman, merely arrives at a more diffuse and *idealizing* characterization of what is essentially an asymmetrical relationship:

> [E]ach participating agent attempts to be responsive to the intentions and actions of the other . . . . Each seeks to guide his behavior with an eye to the behavior of the other, knowing that the other seeks to do likewise.[102]

[100] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 88.

[101] *Id.* at 96.

[102] *Id.*

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What is eclipsed here is that people go about doing things differently depending on their position within the legal system or scholarly discourse.[103] What this view ignores is that substantive applications of the rule of recognition are over-determined by applications informed by social status.

L. The Negativity of Rules

Legal knowledge, substantively considered, comes into existence in a form in which it is encumbered and distorted by power. Coleman does not address this. Instead, he unwittingly trails practiced legal knowledge's tendency to produce idealized descriptions of itself. His theory thereby falls victim to its object. Because conventionalism does not take into account the context from which it emerges and therefore ends up producing a distorted image of its own operation, it makes sense to treat it as a symptom of certain intellectual situation. As a symptom, it both conceals and reveals legal knowledge in a state in which theory has been exiled from practice. It even endorses this exile position.[104] The theoretical reflection of legal practice inadvertently and indirectly reflects the repression of reflection within that practice.

Unwittingly, nonetheless, his analysis confesses to the prevalence of the social over the substantive dimension of following rules. Coleman's attempts to explain what might account for the substantive consistency of applications of the rule of recognition inadvertently reveal the social dimension. Coleman correctly claims the range of convergent behavior alone cannot determine the semantic content of the rule of recognition;[105] at the same time, however, the behavior is said to supposedly "fix" the rule.[106] It would have been interesting to learn *who* is engaged in doing the fixing. The rule exists only when it is practiced. It is manifest in certain paradigmatic instances of agreement even if the participants would find it impossible to agree on the reasons underpinning an agreement from the internal point of view. It is in this vein that Coleman suggests that concepts, in order to function as concepts, do not require criteria but just agreement on paradigmatic cases.[107] It's the boys, again.[108] This is what they do even

[103] I add, in passing, that had Coleman taken the non-idealizing description into account he would have had more difficulty claiming that this practice is pregnant with obligation.

[104] See, most candidly, Gardner, *Legal Positivism: 5½ Myths*, *supra* note 9, at 203.

[105] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 99. Interestingly, Coleman believes that differences regarding the content of a rule are different from differences concerning their application. While this is true for a difference of agreement over what a rule says on its face, which can be settled by looking it up in the relevant rule-book, it is completely implausible to assume that the question of whether two Member States constitutions are sufficient to constitute a "common constitutional tradition" does not affect the content of the rule. I find it difficult to imagine how Coleman would believe that.

[106] *Id.* at 80–81.

[107] *Id.* at 155.

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when it is difficult to make out for the pack what the boys agree on in more general terms. The grasp of the rule cannot be exhaustively articulated in propositional form.[109]

However, spelling out the social dimension of the conventional practice by saying what following a rule means substantively distorts the relation between meaning and practice. If, as Coleman rightly asserts, what it takes to follow or to apply a rule correctly cannot be articulated in propositional form it needs to be concluded that conventional practice is constituted by remarkable *negativity*.[110] Conventions are socially manifest in patterns of convergent behavior. Patterns, when seen internally, are composed of self-reflexive claims alleging to be faithful to the rule.[111] What is casually referred to as "patterns of behavior" is composed of acts that carry implicit self-interpretations. This is the point of the internal point of view. *Whatever* is conceived of as candidate of rule-following is potentially susceptible to critique for being out of line.[112]

From the perspective of a *common* practice, elements of a pattern come to this world as *critical of themselves*. The basis of self-critique is that which cannot be articulated in propositional form. It is *something indeterminate*[113] that is given articulation when attempts are made to explain the point of rules. The respective accounts develop what lends authority to the practice governed by rules. Dworkin was right when he, unwittingly, recognized under the name of "interpretative practice"[114] what Hegel has long before him called spirit.[115] The latter stands for a reflective form of life. It integrates into itself practices for reassuring and examining the authoritativeness of reasons that are taken to be authoritative by their participants. Owing to its negativity, spirit is a product of itself.[116]

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[108] A more sociologically perceptive description of this situation is given by Sunstein in his theory of "incompletely theorised agreements." CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 46–54 (1996).

[109] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 81.

[110] *See* ALEXANDER SOMEK, RECHTSSYSTEM UND REPUBLIK: ÜBER DIE POLITISCHE FUNKTION DES SYSTEMATISCHEN RECHTSDENKENS 343 (1992).

[111] I am aware that Wittgensteinians would at this point say that Wittgenstein insisted that there is a following of the rule that is not an interpretation. See, for example, JOACHIM SCHULTE, WITTGENSTEIN: EINE EINFÜHRUNG 160–61 (1989). It never occurs to them that Ludwig might have been wrong about this.

[112] *See generally* PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY (1958).

[113] For a profound analysis, see GERHARD GAMM, FLUCHT AUS DER KATEGORIE: DIE POSITIVIERUNG DES UNBESTIMMTEN ALS AUSGANG DER MODERNE 140–42 (1994).

[114] *See* DWORKIN, LAW'S EMPIRE, *supra* note 22, at 48; DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 11–12.

[115] TERRY PINKARD, HEGEL'S PHENOMENOLOGY: THE SOCIALITY OF REASON 64 (1994).

[116] ROBERT PIPPIN, HEGEL'S PRACTICAL PHILOSOPHY: RATIONAL AGENCY AS ETHICAL LIFE 65 (2008).

It builds itself, as it were, from the indeterminacy into which practice flows out.[117] Conventional legal practice, by contrast, even though possible,[118] simply is mindless second nature. Reflection is limited to asserting, "This is what we do" and to obeying the maxim, "I do as others do." The question of authoritativeness does not arise.

M. Beyond Convention

It is not for bad reasons that Coleman projects the social dimension of rule-governed activity ("What would the boys say?") into the substantive dimension ("What does it mean?"). Justifications of legal acts, as Hart conjectured correctly, tend to base themselves on rules and not on social reputation. The substantive dimension provides participants with access to justifications. However, it is this very same dimension that allows participants to transcend the context of conventions. Vindications of rule-following are able to escape from intellectual impasse only by either exploring methods of interpretation or by making sense of the rule itself.

Coleman goes wrong in presenting mindless social practice as though it embodied spirit. Nowhere is this more obvious than at various points where Coleman replies to Dworkin's objection[119] that a controversial rule of recognition cannot be conventional.[120] The idea that it is a convention ultimately begins to unravel in the course of his replies. The ultimate characterization renders the rule of recognition as a shared co-operative activity. Coleman characterizes such an activity as "a framework of co-ordination, planning, and negotiation,"[121] which leaves wide leeway for disagreement. Coleman states explicitly:

> It is not surprising that in resolving such disputes, the parties offer conflicting conceptions of the practice in which they jointly participate, conceptions that appeal to different ideas of its point or function.[122]

[117] In anticipation of purportedly Wittgensteinian objections I hasten to add that even within a reflective practice all justifications come to an end. That justifications come to an end (in the sense envisaged by Wittgenstein) does not mean that they are arbitrarily cut off.

[118] I guess this is what Dworkin has in mind when speaking of a "pre-interpretative" stage of practice. DWORKIN, LAW'S EMPIRE, *supra* note 22, at 65–66.

[119] DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 198.

[120] COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 44, at 68, 100, 116, 153–54.

[121] *Id.* at 157.

[122] *Id.*

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I leave it to the reader to conclude how much is left of conventionalism here.[123] I should rather like to return to the conflict between the two readings of positivism, to which I alluded above.

According to the first reading, positivism is commendable because it explains the possibility of, or even gives rise to, objective descriptions of law. Coleman's conventionalism can be understood as an attempt to reconstruct—borrowing his own quasi-transcendental parlance—the conditions of possibility of law's objectivity. The master convention is supposed to constitute the object. It can do its work only, however, as long as it is supported by the complementarity of "This is what we do" and "I do as others do."

It is, however, the case that law can overcome its conventional constitution from within. With the conditions of its social constitution the appearance of "objectivity" also disappears. The negativity of rule-following unearths the intellectual resources necessary, but not sufficient, to extricate legal knowledge from the grip of social power, which is nonetheless indispensible for bringing law into existence. Law's conventional origin is in its more mindful state represented within legal practice only *qua* fictional foundation (as Kelsen's most skeptical rendering of the *Grundnorm* suggests).[124]

This concludes my discussion of conventionalism. Coleman's first-version type of legal positivism is vulnerable to criticism from the second-version type. First, as an attempt to reconstruct for law the conditions under which it is constituted as an object, it ignores how law can turn itself into a more mindful form of social practice. Second, through a failure to account accurately for the conventionality of law Coleman falls victim to idealizations that emerge from the practice itself. The theory remains enveloped in its own object. It is blinded, as it were, by law's ideology.[125]

N. Reclaiming Positivism's Critical Edge

The discussion above has tried its utmost to be performatively consistent. It has submitted the first reading of legal positivism to critical scrutiny from the perspective of the second. The result may seem woefully counterintuitive. The true spirit of legal positivism does not reside in the social fact dogma. Owing to the negativity of rule-following, law has the potential to outgrow the form in which it could be an object of description.

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[123] I, for one, think that Dworkin is that right in suggesting that Coleman "has wholly decamped from the philosophical heritage he undertakes to defend." DWORKIN, JUSTICE IN ROBES, *supra* note 5, at 198.

[124] HANS KELSEN, GENERAL THEORY OF NORMS 256 (trans. M. Hartney, 1991).

[125] That there is something like an "ideology of law," which is part of socially relevant legal knowledge, was one of the more astute insights of the critical legal studies movement.

What is, then, the spirit of legal positivism? It is captured in the maxim to arrive at constructions of legal materials that de-construct, to the greatest extent possible, the idealizations which with these materials are encountered in society without, however, thereby eliminating their normative meaning. For example, interpretations of an international agreement are not infrequently defended as following from its "spirit" or "general scheme."[126] Legal positivists reconstruct the force of such a claim in less exuberant terms by saying, for example, that judges simply have the legal power to make claims of this type even if they are largely nonsensical. When the law invokes reason, legal positivism perceives action.

Legal knowledge is an instance of social action. Law comes into this world in acts that claim to be law.[127] Aside from being instances of social action, the meaning of those acts is sociological in that they claim to determine authoritatively what situations mean in terms of rights and obligations, powers and immunities or privileges and liabilities.

The validation of these draws on so-called "sources" of law. In the German tradition, the most salient of these sources were taken to be custom, legislation and legal doctrine.[128] Theorists of the historical school suggested that it is possible to arrange these sources in a sequence and to reconstruct how the later source fixes problems left unresolved by the former.[129] Indeed, from the perspective of the constitution of legal knowledge it is possible to see that some ground of knowledge could only have been claimed to be a source owing to the prevalence of idealizations masking specific deficiencies. For example, one can profess belief in custom as source of law only by glossing over the fact that it remains profoundly unclear how much usage by whom is necessary to constitute sufficient practice and what it takes to encounter genuine *opinio iuris*. It is unlikely that any theory of customary law would ever be capable of arriving at a satisfactory answer to this question. The reason for being pessimistic is that convincing accounts would invariably have to move custom into a direction where it would appear increasingly similar to a process of legislation, for example, by specifying the number of confirmations, valid modes of expressing consent and constitutional principles that it is required to respect.

Two conclusions follow from this. First, it is possible to see legislation as a *more rational* rendering of what might have amounted to custom. Second, operating with customary law

[126] Case 26/62, van Gend en Loos v. Nederlandse Administratie der Belastingen, 1962 E.C.R. 1.

[127] KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* note 46, at 9–10.

[128] GEORG FRIEDRICH PUCHTA, 1 DAS GEWOHNHEITSRECHT 147 (1828).

[129] *See generally* CARL FRIEDRICH VON SAVIGNY, ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (trans. A. Hayward, 1999).

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as a source presupposes *idealizing* indeterminate factors into determinate conditions of law-making by claiming that there is enough use and sufficient *opinio iuris*.

It is not the case that legal knowledge can avoid all idealizations. Every application of rules involves idealizations in that it perceives certain aspects of a situation as instances of this or that rule. Unnecessary idealizations, however, cover up uncontrolled shifts of power in the relation to adjudicating institutions or to whomever they wish to be of service.

A move from custom to legislation does not remove all unnecessary idealizations. The belief in legislation as a source of law itself ignores that the application of one law rather than another needs to be mediated by a way of knowing which law is to be applied in certain cases. The appeal to legislation as a source idealizes its ability to guide as though laws applied themselves automatically to cases. The effectiveness of legislation, however, depends decisively on the intervention of systematic legal analysis.

In contrast to the common law tradition, which tends to succumb to gross idealizations of the judicial process at large, the continental legal tradition is confronted with the embarrassing realization that scholarship not only is a source of law, but compared with others also most rational, for it establishes intelligible links between the legal system as a whole and the analysis of singular cases. It is superior to judicial decisions in that it develops the grounds that account for both their rationality and validity. Not surprisingly, awareness of scholarship's exalted position is a wellspring of idealizations of which positivism as descriptivism is merely one notable exemplar.

Legal scholarship needs to cope most reasonably with its fate of being a source. To that end, it has to be conducted in a spirit of self-abdication. This requires, in particular, emphasizing the extremely limited relevance of moral objectivity to legal scholarship.[130] Hence, instead of producing morally engaged scholarship legal analysis had better reconstruct the true normative significance of the self-interpretation of legal materials and explore what it *would* take to accept their legitimacy.[131] It also requires rigorous attention to *choices* made by judges and the real capacity to make them stick.

Unreflective legal scholarship is intellectually and socially just as treacherous as the notorious quadditions of courts. Only legal scholarship that adopts as its task piercing through the veil of idealizations will be in a position to rescue legal scholarship from an encumbrance by money and power. Constructive efforts are necessary to this end, and legal scholarship, as a source, will only attain a *legitimate* form by making itself subservient

[130] For a good explanation, see JEREMY WALDRON, LAW AND DISAGREEMENT 176–86 (1999).

[131] Because I am making grand claims here, I refer to my own example of how I believe that promise can be delivered. Alexander Somek, *The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement*, 16 EURO. L.J. 315 (2010).

to processes of collective self-determination. Because, in this respect, the relevant scholarship has to base itself candidly on a requisite political commitment, it can no longer continue the positivist project. Nonetheless, it can inherit its spirit.

O. Conclusion

I mentioned above that legal knowledge is society's mode of authoritatively reflecting on itself in terms of rights and obligations, powers and immunities or privileges and liabilities. Ultimately, the legal relationship reveals what we are to one another.

This is not to say that legal knowledge gives us a full and rich picture of social life. However, insight into modern law reveals what our relationships ultimately turn out to be when things have gone sour. Law is the ultimate point of contraction of social life. As participants in legal relationships, we conceive of one another from a perspective of utmost estrangement, even alienation from ourselves. Law is a social technique of disillusionment. It is enlightenment in practice. It brings to the fore what remains of various purportedly nice and loving dealings as soon as we want to know what we can expect at the end of the day. When the pleasant soundings of comradery have abated we realize that we are factors of production. When love is gone we see that matrimony is, after all, merely a contract that involves, among other things, pledging each other the reciprocal use of the genitals.[132]

There is profound estrangement at the heart of our social existence. Law, if stated in the terms of modest legal scholarship, brings it to the fore. Legal positivism has taught us that. It should not be forgotten.

[132] IMMANUEL KANT, THE METAPHYSICS OF MORALS 96 (trans. M. Gregor, 1991).

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