RULES AND SOCIAL FACTS

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Ronald Dworkin has identified H.L.A. Hart with the view that law consists in rules.[1] That attribution is partially understandable, if ultimately unwarranted. Hart does claim that law consists in rules, but he also explicitly acknowledges that customary norms can constitute part of a community's law though they are not rules. Even if Dworkin overstates the point, it is true that rules are essential both to Hart's jurisprudence and to his theory of adjudication. Why is it that law, for Hart, is primarily a matter of rules?

I. HART AND AUSTIN

In *The Concept of Law*,[2] Hart develops his own position by contrasting it with Austin's. My view is that Hart is constrained by his methodology, which is to develop his view in the light of the particular shortcomings he identifies in Austin's jurisprudence. Nowhere is this clearer than in his development and articulation of the view that law consists in social rules. Before turning to the way in which Hart is drawn to identify law with social rules, it is useful to look at another example of the way in which Hart develops his view as a response to, and ultimately as an extension of, Austin's.

Hart correctly argues that Austin's view of law as the order of a sovereign, backed by a threat of sanction, can explain neither (1) the fact that the commands of dead and departed sovereigns continue to be law, nor (2) the fact that the first command of a nascent sovereign is law in spite of the fact that it has not yet secured the requisite habit of obedience from those it orders.[3]

The flaw in Austin's logic lies in his narrow conception of the nature of law as consisting in liberty-limiting or constraining

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1. *See* R. DWORKIN, LAW'S EMPIRE 34-35 (1986).
2. H.L.A. HART, THE CONCEPT OF LAW (1961).
3. *See id.* at 60-76.

principles or norms.[4] By introducing into the concept of law the idea that some legal norms enhance the scope of liberty by empowering individuals, the problem Hart poses for Austin's account is solved. The sovereign at any given time is someone who occupies a legal office. Occupants of that office have authority of a certain sort; their commands are law. Thus, they are empowered with legal authority by the rules that define their office.

Were all positive law liberty-limiting, then the concept of an office of this sort would be impossible. Such offices are defined by legal rules, but these rules do not constrain. Rather, these rules empower. Were there no such rules, there could be no offices. Were there no office of the sovereign, there would be only particular sovereigns whose identities as such would depend on having secured and maintained the habit of obedience. Thus, the problems of persistence and continuity to which Hart draws our attention would remain. They can be resolved only by notions of sovereignty and the office from which the sovereign governs. Such offices, in turn, are constituted by rules that empower, not by norms that constrain.

Because offices require power-conferring or enabling norms, it comes as no surprise that in identifying the core of his position, Hart claims that law consists in norms of two sorts: those that *constrain*, consistent with Austin's analysis, and those that *enable*.[5]

Hart's introduction of rules into the concept of law has a similar genesis. He begins by noting a problem in Austin's account and demonstrates that the source of the problem is Austin's identification of law with particular commands rather than with norms of sufficient generality and normativity (that is, rules).[6] Jurisprudential theories have traditionally attempted to answer two distinct but related questions. First, what is law, and second, why is it binding? The first of these questions is analytic, hence the concept of analytic jurisprudence. The second question is normative. Many scholars have taken the first question to be an invitation to provide an account of the meaning or the proper or ordinary use of the term "law." These are the theo-

4. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (H.L.A. Hart ed. 1954).

5. *See* H.L.A. HART, *supra* note 2, at 77-79.

6. *See id.* at 78-96.

ries—semantic theories—that Dworkin believes are particularly subject to what he calls the "semantic sting."[7]

The more interesting question concerns the law's normativity or authority. If law is the command of a sovereign, how is it that law can be binding or thought to create obligations in those to whom it is directed? Austin's answer to this question relies on the fact that as a result of the sovereign's ability to offer credible threats, individuals develop a habit of obedience directed toward the sovereign and his commands. Hart objects that the picture Austin paints is one more suitable to the relationship between gunman and hostage, where we are more likely to speak of those to whom commands are directed as being *obliged* to behave in certain ways, rather than as their being obligated so to act. As such, Austin does not account for the law's ability to impose *obligations* upon its citizens. The shorthand way of characterizing this objection is to say that "habits of obedience express what people do *as a rule*," and, as a consequence, are mere descriptions lacking the normative dimension necessary to explain the normative force of law.

Having identified the problem, it remains for Hart to provide the solution. In this case, the solution is provided by the concept of rules. Law is not formed through the marriage of commands with habits of obedience. Instead, Hart argues that law consists in rules, and, in particular, law consists in *social rules*. What are social rules? Social rules have two dimensions. In one respect, they are descriptions and characterizations of what people do *as a rule*. As such, they correspond closely to Austin's "habits of obedience." Habits of obedience, however, lack a normative dimension. By conceiving of these habits as motivated by the credible threats of the sovereign, Austin fails to address this second, normative dimension.

Social rules can have normative force in that they have a prescriptive or reason-giving dimension. Whether they provide reasons for action depends on citizens accepting them from an internal point of view. Social rules that are constituted by convergent social behavior accepted from an internal point of view

7. *See* R. DWORKIN, *supra* note 1, at 45-46. My own view is that there is no such thing as a semantic sting. Whatever objection Dworkin intends to put forward under this label, it is considerably less troublesome than Dworkin thinks it is. Nor do I believe that any of the people Dworkin seeks to criticize, particularly positivists like Raz or myself, see jurisprudence as an effort to provide definitions in the form of necessary and sufficient conditions.

provide reasons for compliance with their demands and grounds for criticizing the noncompliance of others. As such, social rules possess normative force. Only if laws are social rules in this sense can law's normativity be understood in a manner consistent with positivism's identification of law with social fact. In part, this is because acceptance from the internal point of view is itself characterized in terms of the behavior of members of the community. Rules are accepted from an internal point of view when the actors treat the rules as providing them with reasons for acting and with grounds for criticizing the behavior of those who fail to comply with the rules' requirements.

Rules are introduced into the concept of law by Hart as a way of solving the problem of accounting for law's obligatory or reason-giving nature. It is important that the notion of a rule Hart introduces is that of a social rule, a rule that is constituted by convergent social practices, and whose authority as law is also a matter of social fact. The notion of law as social rule is important for two reasons. The first, and most important, is that the concept of authority implicit in law is rooted in behavior, and ultimately in concrete social fact. The second, and most relevant for my current purpose, is that Hart's notion of a social rule is built up from and incorporates Austin's "habits of obedience." A social rule is constructed from convergent social practices; its content, in other words, is given by what people do as a rule. To make all well with Austin's account, we can keep the identification of law with convergent social practices. We simply jettison the view that such practices are normative because they have a causal history of a certain sort—that is, they arise from the sovereign's capacity to render credible threats—and replace it with the idea that such practices are aspects of social rules. Once again, we see how Hart's position is built up from his objections to Austin's.

II. Social Rules and Legal Rules

Introducing this conception of rules into Hart's jurisprudence is not without its share of problems. Law is binding because it consists in social rules. Social rules require convergent social practices. In fact, law can have authority, even in the absence of convergent behavior with respect to them. In some cases, legal rules create a convergent practice where none had

previously existed. In other cases, legal rules adjudicate among conflicting and competing practices. Rules can be law, and binding if law is binding, even if they are not social rules and lack the convergent social practice associated with them. It cannot be the case that the authority of a law depends on the existence of a convergent social practice.

In fact, Hart gives up this account of law's authority. He does not ultimately require that, in order that law be binding, law consist in social rules. In the end, Hart's view is something like this: The authority of a norm as law depends on its relationship to a master rule—a rule of recognition. Law is authoritative if it is *valid* under a rule of recognition. The rule of recognition sets forth the conditions of legal validity. For each norm subordinate to the rule of recognition, its authority does not depend on it being a social rule. Social rules depend on convergent social practices, and in the case of many particular legal rules, there is no social practice of the relevant sort. Therefore, we find in Hart an inconsistency that is largely a function of the development of his theory entirely as a response to the shortcomings he identifies in Austin.

If Hart cannot consistently advance the view that law's authority depends on law consisting in social rules, what view of law's authority does he ultimately come to? Hart has a two-part answer. For rules subordinate to the rule of recognition, legal authority is a matter of legal validity. Particular norms are binding provided they are valid under a rule of recognition, but what makes the rule of recognition authoritative?

There are only three possibilities. First, the authority of the rule of recognition may itself be a matter of its validity under some other rule. This is hardly a satisfactory solution because it renders this latter rule the true rule of recognition. Instead of answering the question, it merely postpones it. Alternatively, the authority of the rule of recognition may depend on its morality; that is, the rule of recognition is itself ultimately a normative rule whose authority is a matter of its truth as a principle in some defensible critical morality. This solution will not work for the positivist for the simple reason that it reduces positivism to a form of natural law theory. Finally, the authority of the rule of recognition may itself consist in its being a social rule, constituted by a social practice among the relevant officials, a rule that they accept from the internal point of view.

This last solution is in fact Hart's position.[8] The claim that all laws are binding because they are social rules disappears. Instead, laws are authoritative, provided they are valid under some other rule, the rule of recognition. Thus, the authority of particular norms as law is a function of their having a formal relationship of validity with the rule of recognition. But that rule's (the rule of recognition's) authority cannot be a matter either of its formal validity or its substantive defensibility. Its authority must be a matter of *social fact*. Thus, Hart saves the social rule account of legal obligation by abandoning the claim that all legal rules are social rules. He replaces that account with the view that a norm has legal authority only if it is valid under a rule of recognition that is itself authoritative because it is a social rule.[9]

The rule of recognition is a social rule, but a very special one.

8. *See* H.L.A. HART, *supra* note 2, at 144-50.

9. Two brief points should be made here. First, in the same way that Hart's view is constrained by the fact that he develops it largely as a response to the shortcomings he finds in Austin's account, Dworkin's early work, *Taking Rights Seriously*, is constrained by the fact that his view is developed largely as a response to the features of Hart's view that he finds objectionable, especially Hart's theory of adjudication. Thus, it comes as no surprise that Dworkin develops his theory of law by beginning with a theory of adjudication. *See* R. DWORKIN, *supra* note 1, at 1-44, *passim*; R. DWORKIN, TAKING RIGHTS SERIOUSLY 14-45, *passim* (1977). Like Hart, whose work is defined by the parameters Austin's account provides, Dworkin is imprisoned by his connection to Hart's account.

The second point concerns the rule of recognition and is more interesting and controversial. Two possible conceptions of the claim that the rule of recognition is a social rule should be distinguished. The first is that the rule of recognition is itself a social rule in the sense that its content is determined by a convergent social practice accepted from the internal point of view. The substance or content of the rule is given by the practice.

The second interpretation of the claim that the rule of recognition is a social rule recognizes that the rule itself may not be constituted by convergent social practices. Instead, its authority as a rule of recognition depends on there being a social practice of accepting it as authoritative.

The difference is important and complex. First, to claim that the rule of recognition is a social rule is to say that its content cannot be specified other than as a description of a prevailing practice. In the second interpretation, the one that I favor, the rule of recognition, in principle at least, can be specified independently of the existence of a social practice. Rather, the social practice is a complex of behaviors of officials oriented toward the rule of recognition. There can be a rule of recognition in the second sense independent of the practice, though there may be epistemic barriers to determining its content. The first, traditional interpretation, which views the rule of recognition itself as a social rule, maintains that the content of the rule is given by the practice, whereas the authority of the rule is given by its acceptance from an internal point of view. In the second interpretation, it is not a necessary feature of the rule of recognition that its content be given by a convergent practice. It is this distinction that threatens to reduce positivism to a form of realism. What makes the second interpretation of the rule of recognition consistent with positivism is the claim that the authority of the rule depends on the existence of a social practice among officials oriented toward it, a practice of accepting a rule accepted from the internal point of view. In both interpretations, there can be no rule of recognition without a convergent practice. The difference is

It serves two functions in Hart's jurisprudence: One of these is epistemic, the other ontological or semantic.[10] The rule of recognition serves an epistemic function to the extent it specifies conditions of identification, validity, and authority. The rule of recognition serves an ontological or semantic function to the extent that it specifies existence and truth conditions.[11]

Once there is a rule of recognition, the authority of a particular rule need not depend upon its being a social rule. If norms can have legal authority without being social rules, must they be rules at all? What constraints does positivism impose on the sorts of norms that can be law or sources of law? To the extent that law is a matter of rules, what sort of rules must law be? The account that Hart gives in the first few chapters of *The Concept of Law* suggests that law must consist in rules and that otherwise law's authority cannot be explained.[12] Once Hart recognizes the plain fact that law can be authoritative even if it does not consist in rules, however, he can no longer require that law consist in social rules. Does this mean he has to give up the claim that law consists in rules? Or does it mean that if he remains committed to the view that law consists in rules, he needs another argument in support of it? If he does not require that law consist in rules alone or primarily, what else might law consist in? Does legal positivism have a stake in the extent to which law is necessarily or primarily a matter of rules?

III. SCHAUER AND THE POSITIVIST TRADITION

Hart does not specifically address any of these questions. They are, however, among the questions that Professor Frederick Schauer takes up both in this Symposium[13] and in the book-length manuscript, *Playing By The Rules*.[14] Schauer sets for him-

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that in the first interpretation, but not the second, the rule is constituted by the practice.

10. *See* J. COLEMAN, *Negative and Positive Positivism*, in MARKETS, MORALS AND THE LAW 1, 5 (1988).

11. One of the problems in Raz's version of positivism is the fact that he invariably runs these two functions together. *See* J. RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 212 (1979). So, for example, he claims that the sources thesis applies to both law's identification and existence conditions. The conditions that must be satisfied to identify law, however, need not coincide with those that are necessary either to establish law's existence or its justifiability.

12. *See* H.L.A. HART, *supra* note 2, at 1-76.

13. *See* Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991).

14. F. SCHAUER, PLAYING BY THE RULES (forthcoming 1991). In the essay in this volume, Schauer restricts himself primarily to the question: What is the relationship be-

self the task of analyzing the nature of rules, and then exploring their relationship to law. In his contribution to this volume, he is most interested in the under- and over-inclusiveness of rules.

We can distinguish between rules and the sets of factors that support them. These factors include considerations of justice, social policy, morality, and efficiency. In some cases, a decision based on rules will not further the goals or aspirations that support the rule as well as might a decision based directly upon more particularistic and contextual considerations. Rules are incapable of being perfectly fine-tuned. Sometimes rules will include within their domain cases that fall outside their set of background reasons, and they will exclude others that fall within that set. These characteristics are a function of rule generality. Thus, rules are necessarily under- and over-inclusive *with respect to the sets of reasons that support or ground them.*

Because rules are designed to promote certain background aims and ambitions, and because rules are both under- and over-inclusive with respect to those goals and principles, it is a fair question to ask why law should emphasize rules. Why not appeal directly to the reasons and leave rules out altogether? This question presupposes that a particular jurisprudence is a matter of choice, that a community can choose whether its law should consist in rules or in the principles that inform rules. Finally, this raises the question in analytic jurisprudence whether law is necessarily a matter of rules, for if law is necessarily a matter of rules, then communities are not free to formulate law in terms of background reasons alone—or even primarily in those terms.

We can distinguish between an analytic question of general jurisprudence and a question about a particular jurisprudence, namely, positivism. The question of general jurisprudence is whether law necessarily is a matter of rules. Is there something about the nature or essence of law that requires that legal norms consist in rules? The question about positivism is whether *it* is committed to the view that law necessarily consists in rules. Certainly, Dworkin believes that positivism is commit-

tween law and rules? In the book-length manuscript, he provides an analysis of the nature of rules more generally, and of the way rules figure into our social and normative lives.

ted to the view that law consists in rules.[15] That assumption is one of the reasons that in his early articles he concludes that he has defeated positivism by showing that principles and policies can be legal norms though they are not rules.

Hart is committed to the view that law consists in rules as a consequence of his belief that the reason-giving capacity of law depends on law consisting in social rules. Once the social rule argument evaporates, so too does the only argument for law-as-rules in *The Concept of Law*. So if positivism is committed to the model of rules, there is no argument for that position in Hart. My view is that positivism is not in fact committed to the view that law consists in rules.

For his part, Schauer simply assumes that positivism is committed to the view that law consists in rules.[16] Like Dworkin, he identifies positivism with the jurisprudence of rules and attempts to provide an explication of what rules are. Assuming that positivism is the jurisprudence of rules, he begins his inquiry with the problem of general jurisprudence: Is law necessarily a matter of rules or not? Schauer's answer to the problem of general jurisprudence is that law is neither necessarily a matter of rules exclusively, nor is it necessarily a matter of reasons exclusively. This is the easy answer, but it is an answer to an easy question as well. The more difficult question is whether law must be in some part, large or small, a matter of rules, even if it is not necessary to the concept of law that all law consist in rules.

Following Schauer, I accept that law need not be exclusively a matter either of rules or of reasons. It can be a mixture of both, or it can, in a particular community, be one or the other. Which mix of rules and reasons is expressed by American jurisprudence? That is a question of particular jurisprudence, and at first blush, appears to be a question in sociology, not one in analytic or normative jurisprudence. To the extent that answering it requires a constructive interpretation of our existing practice, however, it is as much a problem in jurisprudence, analytic and normative, as it is a problem in sociology.

Like Hart, who constructs his account in response to the failings he identifies in Austin, and like Dworkin, who develops his theory of law as a response to the shortcomings he notes in

15. *See* R. DWORKIN, *supra* note 1, at 33-35.
16. *See* Schauer, *supra* note 13, at 662-63.

what he takes to be Hart's theory of adjudication, Schauer stakes out the ground between Hart and Dworkin, who represent the jurisprudence of rules and of reasons, respectively. He accepts Dworkin's characterization of positivism as the model of rules.[17] At the same time, he characterizes Dworkin as arguing for the centrality of reasons and sources of law, not for rules of law as such.[18] Rules merely give expression to a set of principles that provide the best explanation of them. Jurisprudence begins with the rights of litigants. These rights derive from the best theory of the law. Rules are the data from which the theory is to be constructed, but the judge's task is to enforce the relevant rights, not to apply the rules. Thus, Schauer identifies Hart's positivism with the model of rules and Dworkin's position with the model of reasons.[19] In advancing the view that law is neither a matter necessarily of rules nor of reasons alone, Schauer intends to offer an alternative to both Hart's positivism as well as to Dworkinian rights theory. He calls his thesis "presumptive positivism," emphasizing the centrality of rules to jurisprudence and the importance of departures from rules to the reasons that support them.

A. *Jurisprudence and Reasons*

In fact, as Schauer correctly notes, Dworkin's theory is only one of a family of possible alternatives to rule-based jurisprudence. Let us call all members of this family "all-things-considered" theories, by which we mean that in a particular case, a judge should reach the result that is best, all things considered. The contrasting view is that in particular cases, judges should reach those decisions that are dictated by the rules, whenever rules dictate decisions, whether or not the decision is the best, all things considered.[20] In this regard, three points need to be emphasized.

17. *See id.* at 668-71.

18. *See id.*

19. *See id.* at 665-74.

20. It is unclear exactly the sense in which rules dictate particular results, in Schauer's view. In one sense, we can say that the rule has particular *linguistic* indications. For example, suppose the relevant rule of law prohibits motor cars in the park on weekends. A Ford or Chevrolet automobile is a motor car, and if such a car is found in the park on the weekend, it stands in violation of the law. On the other hand, we might say that a rule has decisive *normative* indications if it turns out that a particular case is an instance of the policies, principles, and goals that support the relevant rule. Linguistic indications of a rule need not coincide with its normative indications.

1. *Rules, Reasons, and Open Texture*

The first point concerns the open texture of rules. A theory of law that emphasizes rules in the way Schauer believes that legal positivism does recognizes cases in which rules neither dictate nor indicate a particular result. A positivist may claim that judges should decide such cases in ways that produce the best result, all things considered. In spite of this feature of rule-based theories, an important difference between them and all-things-considered theories remains. This difference surfaces in those cases in which the rule departs from what would be best, all things considered. In such cases, all-things-considered theories claim that judges should impose the outcome that is the best, all things considered, even if the rules dictate a different result. And this is precisely what someone who believes in the centrality of rules means to deny. Thus, the open texture of rules provides an area of overlap between rule- and non-rule-based theories, but it does not imply that rule-based theories collapse into all-things-considered theories.

2. *Rules, Reasons, and Adjudication*

The second point concerns the theory of adjudication. In all-things-considered theories, adjudication is nothing more than determining what, in a particular context, is the best result. It is central to Schauer's analysis that rule-based theories can give different results than all-things-considered theories. This claim requires that Schauer produce a theory of adjudication—an account, in other words—of the ways in which judges apply and follow rules. In particular, he argues that rules dictate or indicate results.[21] This is precisely what realists deny. I do not deny that rules dictate results, but it is incumbent upon anyone who wants to emphasize a distinction between rule-based and other theories to show how rules generate results in ways that do not collapse rule-based theories into all-things-considered theories.

3. *Reasons and Constraints*

The third point to note is that there is an enormous variety of all-things-considered theories that differ in a number of dimensions. First, there can be forward- and backward-looking theo-

21. *See* Schauer, *supra* note 13, at 671-74.

ries. Economic instrumentalism is a version of the former; Dworkin's rights thesis is a version of the latter. According to economic instrumentalism, judges decide cases so as to minimize costs and maximize welfare *in the future*. Legal disputes enable us to more finely hone the incentives that legal rules put in place; those incentives are, or should be, wealth-maximizing. According to a version of Dworkin's thesis, judges enforce the preexisting rights of litigants. In both cases, the role of preexisting rules is of contingent and derivative significance. In the instrumentalist account, rules are (at best) approximations of efficient solutions to resource allocation problems. Moreover, in determining what would be efficient, judges should consider the extent to which departures from the rule threaten to upset the coordination effects of well-entrenched rules.

In Dworkin's view, the rules are presumed to be an articulation or expression of underlying principles of a political morality. In every case, even those that fit the core of a rule, the judge must take recourse to those principles to determine the litigant's *preexisting* rights under the law, not under the rules. Thus, economic instrumentalism is forward-looking; Dworkin's rights-based thesis is backward-looking. In both cases, explicit legal rules are understood in the context of approximations of the background policies and principles. In the former case, legal rules are efficient solutions to resource allocation problems. In the latter case, legal rules operate as expressions of the underlying principles of justice and fairness characteristic of constitutional democracies.

IV. Positivism and Presumptive Positivism

Schauer articulates a theory located between rule-based positivism and Dworkin's all-things-considered theories: a theory that lies between rules and reasons. Schauer identifies his position as presumptive positivism, indicating the centrality of rules in the first instance and the flexibility to consider the background reasons. He attempts to develop his theory in such a way so as to be conceptually unassailable, descriptively accurate, and normatively attractive.

There are many ways one might seek to criticize Schauer's position. One might ask whether he correctly describes or characterizes the positions with which he seeks to contrast his own. On the other hand, he might have these accounts right, but his

account of Anglo-American jurisprudence may be *descriptively inaccurate*. Finally, his account of law in constitutional democracies may be descriptively accurate, but it may be *normatively unattractive*. That is, he may over- or under-emphasize the value of rules in law.

There are some problems with all of these aspects of Schauer's thesis, but in an essay of this sort I am in no position to explore them all. Therefore, I will focus on problems of the first sort. Frankly, as one of the positivists Schauer discusses, I don't think he has positivism right. I want to lay out my version of positivism and contrast it both with Schauer's and Raz's, with which he periodically aligns himself. I then want to explain why the version of positivism I advance is descriptively accurate in ways that Schauer suggests it cannot be. Ultimately, my account is descriptively and conceptually more accurate than Schauer's.

A. *Negative and Positive Positivism*

It is important to distinguish between two forms of positivism. I label these negative and positive positivism.[22] Both theories attempt to identify the core claims of positivism: just what positivism as a legal theory seeks to assert or to deny; what its essential elements are; what every positivist must assert is true of law necessarily. In "Positivism and the Separation of Law and Morals,"[23] Hart argues for a version of positivism that merely denies a necessary connection between law and morals. There is no necessary connection between what the law is and what it ought to be. In other words, the fact that a legal norm is valid in a particular community does not imply that it is a morally desirable norm of behavior. On the other hand, as Raz notes in passing, it does not follow that the validity of a norm as law somehow precludes a norm's moral desirability, even to the extent that it is compatible with this claim of positivism that every valid norm of a legal system turns out to be morally desirable.[24] The core claim of positivism is simply that the morality of a legal norm is analytically distinct from its legality.

Positivists and their critics refer to this core claim of positiv-

22. *See* J. COLEMAN, *supra* note 10.

23. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

24. *See* J. RAZ, *supra* note 11, at 212. Raz makes the same argument in a more recent article. *See* Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1, 10 (1984).

ism as the separability thesis. Though no proponent or critic of legal positivism denies that positivism is committed to the separability thesis, there is far less agreement about what it means and its implications for positivism. Hart characterizes the separability thesis as the claim that there is no necessary connection between the law as it is and as it ought to be. I understand this to mean that positivism is committed to the view that the morality of a norm is not necessarily a condition of its legality. Ultimately, however, positivism does not rule out the possibility that, in some legal regimes, the legality of a norm can depend on its morality. An important difference, in my view, is that positivism denies that the morality of a norm is a necessary condition of its legality. The separability thesis can be characterized in other equally defensible ways. For example, it can be understood as the claim that even in those communities in which law and morality are coextensive, they are not cointensional. Alternatively, it might be understood as claiming that what makes a norm a matter of the community's law is distinguishable from what makes it a part of that community's morality.

All versions of positivism that are characterized entirely in terms of the constraints imposed by the separability thesis alone I call negative positivism to draw attention to the sort of claim that they make, namely, a negative one. Instead of articulating some truth about all law everywhere, negative positivism simply denies that morality is necessarily a condition of legality for all possible legal systems.

Given a proper interpretation of the separability thesis, I think negative positivism is conceptually unassailable and descriptively accurate. There is no logical or conceptual contradiction in asserting that there exists a possible world in which there is law and in which what makes something law is not a matter of its morality. So long as such assertions are not contradictory, negative positivism will be unassailable. It is descriptively accurate largely because it makes no descriptive claim. It does not say that such-and-such is true of law in the United States, England, or the like. It simply says what is not necessarily true of law, period. So what is true of law in the United States, or anywhere else, for that matter, will be perfectly compatible with positivism, so understood. Therefore, while I am convinced that negative positivism is both concep-

tually unassailable and descriptively accurate, it is also true that I do not think it a very interesting thesis—and neither should you.

One might impose an adequacy condition on theories of general jurisprudence that they make a claim about what, if anything, is true about all possible legal systems. That is a reasonable constraint on anything that purports to be a general jurisprudence, as opposed, say, to an American jurisprudence—a subject about which I for one have considerably less interest. Now it is perfectly compatible with all that I have said so far that there is nothing that is true of law as such: that all features of legal systems other than that captured by negative positivism are contingent features of them. This is a perfectly plausible thesis, and perhaps it is the "positive" claim advocates of negative positivism are prepared to put forward.

B. *Understanding Law's Sociology*

Still, I think a positivist can say more, and what that something else is is captured by a form of what I call positive positivism. Theories are instances of positive positivism if they make a claim about what is true of all legal systems necessarily—as part of the very concept of law or legality—claims that are consistent with and motivated by the underlying commitments of a positivist jurisprudence. What are those commitments? So far, following Hart, we have identified positivism with the separability thesis. Is there anything other than the separability thesis to which positivism is committed? Raz, for one, identifies positivism with the claim that law is essentially or fundamentally *institutional* in nature.[25] I agree, but the claim needs to be clarified further. Both Raz and I want to express the institutional nature of law in terms of the claim that law is ultimately a matter of social fact. In my view, law is ultimately a matter of social fact in the sense that the authority of the rule of recognition is itself a matter of social convention. I want to explain what I mean by this claim. In doing so, I shall contrast my position with Raz's, identify where Schauer thinks I run into trouble, and respond to his objections.

Let me begin by noting that the view I advance, that law is ultimately a matter of sociology or social fact, is not original

25. *See* J. RAZ, *supra* note 11, at 191.

with me. In the introduction to *The Concept of Law*, Hart claims that the book can be viewed as an inquiry into analytic jurisprudence or descriptive sociology.[26] This is a deep point. For I believe the point of positivist jurisprudence is to demonstrate exactly how thin the concept of law is; how few are the substantive inferences that can be drawn from it; how minimal its moral content is. If one wants to know anything particularly substantive about a legal system or culture, one has to go beyond analytic philosophy to sociology, to an account of the ongoing practices that constitute a community's legal culture, an account that is, in a variety of ways, internal to the culture and to its practices.[27]

It is also worth noting how deep the commitment to jurisprudence-as-sociology runs in *The Concept of Law*. First, when discussing how law can be binding, Hart notes that the answer lies in the fact that law consists in rules. What kind of rules? *Social rules*![28] And what exactly are social rules? They are constructed from existing social practices. Moreover, what makes them binding or authoritative? The fact that they are accepted from an internal point of view. But how does Hart analyze acceptance from an internal point of view? In terms of social behavior, that's how. Rules are accepted from an internal point of view if individuals use them in a certain way, if they characteristically appeal to the rules to provide grounds for criticism and reasons for action.[29]

Next, when Hart abandons the view that a law is binding only if it is a social rule, what does he put in its place? Two related notions. First, that the legality of a norm depends on some fact about it. What fact? That it satisfies the conditions of legality set forth in the rule of recognition. That is either true of a norm or it is not, and whether it is depends on the criterion of legality set forth in the rule of recognition. Whether or not it is true of a norm is a *social* fact about it. Second, the authority of the rule of recognition itself is a matter of social fact. Hart puts

26. *See* H.L.A. HART, *supra* note 2, at v-vi.

27. One cannot doubt that the central positive claim of positivism is that law is ultimately a matter of social fact. Returning to Austin, one again notes that the law is the order of a sovereign, but what makes someone the sovereign? Two social facts provide the answer: First, she has the habit of obedience from subordinates, and second, she is not herself in the habit of obeying anyone. Raz and the sources thesis also shed light on this inquiry. *See* J. RAZ, *supra* note 11, at 210-16.

28. *See* H.L.A. HART, *supra* note 2, at 86-96.

29. *See id.* at 55-56.

this somewhat differently. He says the rule of recognition is itself a social rule. It is not valid or in some other sense correct; it just is. In either case, legality is a matter of social fact.

There are a lot of ways of understanding these claims, but Dworkin does not seem fully to appreciate them. The claim that law is a matter of social fact is sometimes treated by Dworkin as the claim that law is a matter of plain fact or historical fact or uncontroversial fact or else it is a matter of pedigree.[30] It is evident that none of these claims is equivalent to or otherwise entailed by the claim that law is a matter of social fact. Social facts may or may not be plain, simple, historical, or uncontroversial.

Schauer follows Dworkin in ascribing to positivism the view that the legality of norms is a matter of their pedigree.[31] I fail to see how either the separability thesis or the claim that law is a matter of social fact entails this requirement. Let's return to the distinction I have mentioned between the epistemic and semantic senses of the rule of recognition. Now if the rule of recognition is a semantic rule—as I have argued it is—there is no reason why the conditions of legality set forth in it should rely entirely on pedigree.[32] On the other hand, suppose the rule of recognition is an epistemic rule, that is, it specifies criteria by which individuals can come to know what the law of their community is. In that case, the claim that the rule of recognition must set out a pedigree test of legality is understandable, but it is still incorrect.

The basic idea is this. Let's contrast a pedigree standard with a moral standard. A pedigree standard will look something like this: (x) (x is a proposition of law iff x has been passed by a legislature and signed by the relevant executive, or x is an established judicial precedent). A moral standard may look like this: (x) (x is a proposition of law iff x represents a dimension of justice or morality within the best moral theory). In order to determine whether something is part of the community's law under the typical pedigree standard, one need only look it up. It can be found by nearly everyone, at least in principle, and so everyone can determine by the use of the relevant rule of recognition what their rights and duties under the law are. On the

30. *See* R. DWORKIN, *supra* note 1, at 33-35.
31. *See* Schauer, *supra* note 13, at 666; R. DWORKIN, *supra* note 9, at 17.
32. *See supra* p. 709.

other hand, determining what the law is under the moral criterion is no easy matter. It requires substantive moral argument. Controversy about one's rights and duties will be inevitable, and individuals guided by such a rule of recognition will be unlikely to ascertain adequately, let alone fully, the scope of their legal rights and obligations. Only if one identifies positivism with Hart's version of it does it make sense to characterize positivism as committed to a pedigree standard of legality.

But there is no reason to identify every claim Hart advances with an essential commitment of positivism more generally. Moreover, epistemic adequacy does not require pedigree. Pedigree standards are among those standards that in principle can be epistemically adequate. In principle, any non-contentful criterion of legality can be epistemically adequate. The real problem surrounds the question whether contentful standards of legality can be epistemically adequate. To answer this question completely, we will need a good analysis of what it means for a standard to be contentful as well as a conception of epistemic adequacy. In the context of this paper, we shall settle for something less. Let's say that a standard is contentful if determining whether something is law under it requires an evaluation of the norm's value. On the other hand, let's say that something is epistemically adequate if average citizens can reliably call upon it to determine with an acceptable degree of confidence what their legal rights and responsibilities are.

It follows that some contentful standards of legality can be epistemically adequate. Substantive consideration of a norm's value need not stir controversy nor need a criterion that requires such assessments as a condition of legality prove epistemically unmanageable. Certainly in communities that share some fundamental set of values, not only in the abstract, but in concrete particulars as well, reference to a norm's value as a condition of its legality need not render the rule epistemically inadequate or essentially controversial.

Of course, some possible rules of recognition will be less than epistemically adequate in this sense. The rule that a norm is a legal norm iff it is part of the correct morality may well be such a rule. But even here notice how much is being assumed about the background conditions of the community. When critics like Dworkin deny that any such rule can be a rule of recognition in the positivist's sense, they are presupposing that any

such rule will be a source of substantial controversy. If it is a source of substantial controversy, it cannot be a social rule nor can it be epistemically adequate. It cannot be a social rule because social rules are constructed in part from convergent practices and such rules lead to divergence, not convergence.[33] It cannot be an epistemic rule because individuals cannot appeal to it in a reliable way to determine their legal rights and duties.

But neither of these claims really follow, do they? In my view, as I noted earlier, the rule of recognition is not itself a social rule. It is authoritative only if there is a social practice in regard to it among relevant officials. Therefore, it need not be constructed out of convergent practices. And, in particular communities, there may be so much agreement about the demands of a correct morality that the rule of recognition is in fact epistemically adequate in that community. In other words, the claim that such a rule cannot be epistemically adequate has as its background condition a view of societies like our own—extremely heterogenous and pluralistic. That is a contingent feature of social organizations, not a necessary one.

Moreover, I deny that the rule of recognition must be epistemically adequate in this sense. My claim is that an analysis of the concept of law is fundamentally a *metaphysical* inquiry; and, as such, the rule of recognition must specify ontological or semantic conditions only. Is the analysis fundamentally a metaphysical one?

To see where the issue lies, consider the difference between Raz and me. Recall that we are discussing my claim that positivists are committed to the view that law is in some sense a matter of sociology or social fact. Raz and I differ on what the proper interpretation of this claim is or should be. For Raz, it entails the view that what makes any norm a matter of law must be a social fact about it: This is his famous Sources Thesis.[34] Thus, even if the norms themselves need not be social rules or facts, the conditions of legality must be social facts, as opposed, say, to moral criteria. That, for Raz, is what it means for the law to consist in social facts. And it is a position he believes is true of both law's epistemic and existence conditions. Thus, in Raz's view, "(*x*) (*x* is a legal norm iff it is a dimension of justice or morality in the best critical moral theory)" could never be a

33. *See* J. COLEMAN, *supra* note 10, at 12-20.
34. *See* J. RAZ, *supra* note 11, at 212.

rule of recognition, for such a rule would identify the grounds or sources of law with moral arguments, not social facts.

In my view, there is no reason why such a rule cannot be a rule of recognition, at least in principle. Therefore, I must have something else in mind when I claim that the law is ultimately a matter of sociology or social fact. I do. My claim is not that the conditions of legality must specify only social facts about norms; rather, the claim is that a particular rule of recognition that is the rule of recognition in a particular community is a social fact about that community. For Raz, the social fact thesis is a constraint on the content of the rule of recognition itself. In my view, neither the separability thesis nor the view of the rule of recognition as a semantic rule imposes any constraints on the substantive content of a rule of recognition. Virtually anything can in principle be a rule of recognition. That a particular norm is the rule of recognition in a community is in my view a social fact about that community; it is not, for example, a claim in critical morality, and therefore, its truth does not depend on substantive moral argument. That in my view is the cash value of the claim that law is a matter of social fact. In short, determining which norms are part of a community's law may well involve substantive moral argument given a particular rule of recognition; that that rule is the rule of recognition, however, is a social fact about the community that does not require moral argument for its truth.

V. The Limited-Domain Thesis

Properly understood, the separability thesis does not restrict the *content* of a rule of recognition. Thus, in some community, the rule of recognition may be: x is law in the community iff x is a principle of a correct or defensible morality. In that case, a community's law will be a proper subset of morality. This is a logical consequence of my view. Is there anything wrong with it? Both Schauer and Raz think so. Schauer asserts that positivism insists on a distinction between "law" and "non-law," and he cites a variety of people to that effect.[35] And since my view entails the possibility that in a *particular* community, there may be no difference between the two, either my view is incorrect or it is not positivism. This objection is groundless, however.

35. *See* Schauer, *supra* note 13, at 666 & n.41.

Suppose that, in every possible legal system, the community's law completely *coincided* with what was morally correct. This would show only that law and morality are everywhere coextensive, not that they are cointensional. As I understand positivism, it is the intensional (conceptual) relationship between law and morality that counts. Even if law and morality coincide, what *makes* something a moral principle is the fact that it is so in the correct theory of morality; and what *makes* something law is the fact that it satisfies the conditions of legality in the rule of recognition. The ontological and semantic criteria of law and morality continue to differ. Generally, if law and morality coincide in a particular community because the criterion of legality is *x* is law only if it satisfies the criterion of morality, the distinction between law and morality would remain. There is a criterion of morality, and there is the separately identifiable criterion of legality.

It would be a very different thing if it were not merely a contingent social fact about all legal systems that their rules of recognition made morality a condition of legality, if, for example, it could not be otherwise, that the concept of law required that law be a matter of morality. Then, the relationship between legality and morality would be intensional. Only then would there be no separation between law and morality of the sort envisioned by the separability thesis.

There is an important sense in which anyone who accepts the separability thesis believes that there is a difference between the categories of "law" and "non-law." The difference is one of criteria of meaning, not extension.

Schauer appears to treat the claim that there is a difference between law and non-law as equivalent to what he calls the *limited-domain thesis*, by which he means that in any community the law must be only a part of that community's stock of norms.[36] The limited-domain thesis is *not* entailed by the law/non-law distinction. The former is a claim about concepts; the latter is a claim about norms in particular communities. As I demonstrated above, in some community, the law may coincide completely with its morality, and yet there will be the analytical or conceptual difference between law and non-law.

Because the limited-domain thesis is not entailed by the sep-

36. *See id.* at 667.

arability thesis, it must stand on its own. The limited-domain thesis's truth is supposed to present a problem for my view. Because my view allows anything to be a rule of recognition, it allows law to be unlimited, whereas in fact law everywhere is limited. Therefore, my form of positivism, even if it is conceptually unassailable, is *descriptively* inaccurate. Nothing could be further from the truth. My view is not that law will invariably be unlimited, only that in principle it can be; it all depends on the particular rule of recognition in effect. Very likely, the law of most communities will be limited by the rule of recognition in just the way Schauer thinks our law is limited and for just the sorts of reasons Schauer has in mind. My thesis, remember, is that legal theory is ultimately a matter of descriptive sociology, not conceptual analysis. So how can its conceptual claim, which after all is just, law is sociology, render it descriptively inaccurate?

It is my view that the law can in a particular community be unlimited. Perhaps Schauer's point is that because of the limited-domain thesis, law can *never* be unlimited. I hold that law *can* in principle be unlimited. But the limited-domain thesis denies that it can be. Then my theory fails, not because it is descriptively inaccurate, but because it is conceptually inadequate. Positivism is committed to both the separability and social fact theses. Neither of these entail the limited-domain thesis. Therefore, there are no grounds for rejecting my version of positivism because it violates the limited-domain thesis, which is itself unmotivated by the concerns that animate positivism in the first place.

In short, positivism as I understand it does not claim that law is necessarily a matter of rules. Nor does it claim that law necessarily has a limited domain. It does claim that law and morality are distinct and that law is a social fact. I have cashed these out in the following way. The difference between law and morality is conceptual; it has to do with the criteria of meaning of the terms. Terms with different meanings can have the same extensions, and so the law of a community can completely overlap with its morality. The criterion of meaning of law is the rule of recognition; and what that rule is in a particular community is a matter of social fact; and that is the social fact aspect of law.

VI. Conclusion

I have argued that the limited-domain thesis is itself unmotivated, but this claim is contentious. I want to close by sketching a version of positivism that grounds the limited-domain thesis in an account of the relationship between law and practical reason. I attribute this view to Joseph Raz. The theory of practical reasoning is at the heart of Raz's work.[37] What is interesting about law for Raz is that it can provide reasons for acting, reasons of a special kind, peremptory or exclusionary reasons. Such reasons are imposed by authorities. Law must claim for itself the possibility of being such an authority. This is a *necessary* feature of law. In other words, the concept of law entails the possibility of authority. If law can be the sort of thing that has authority, then it must be the sort of thing that provides reasons of the sort authorities do. These are exclusionary reasons. Now it is part of Raz's view that norms that provide such reasons cannot be fundamentally controversial, because if they are, they cannot guide action in the appropriate way. Thus, legal norms cannot be substantive in the way in which my theory says they can be. For such norms cannot be authoritative in the way in which they must be if they are to provide reasons for action.

Raz's view then requires the version of the social fact thesis he advocates, and it precludes mine. It also entails a dichotomy between law and non-law in every community in which there is law. But notice that in Raz's case, the limited-domain thesis is motivated in a way in which it is not in Schauer's case. To evaluate whether Raz or I get the better of this, we would need to determine first whether the concept of law is connected to the concept of authority in the way in which Raz says it is; whether the concept of authority is to be understood in the way Raz says it must be; and finally, whether analytic jurisprudence is itself part of the theory of practical reasoning. In fact, I want to deny each of the claims Raz either explicitly or implicitly makes on behalf of his thesis, but that is an argument for another occasion.

37. *See, e.g.*, Perry, *Second-Order Reasons, Uncertainty, and Legal Theory*, 62 S. Cal. L. Rev. 918 (1989).