

THE HARTIAN TRADITION IN INTERNATIONAL LAW

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Jeremy Waldron has recently argued that Public International Law (PIL) is the only major area of law not yet explored and explained by those operating in the Hartian tradition of legal theory.¹ I hope in the present paper to demonstrate the incompatibility of Hartian methodology with PIL, and thus the extent to which PIL illustrates the limitations, indeed the outright failure, of the Hartian approach to legal theory.

Nonetheless, I also hope to show that Neil MacCormick – sometime wayward son, sometime protégé and champion of the Hartian tradition – has quietly re-invented British Positivism, or at least offered a new and preferable trajectory for its development. This is the task of the present paper: to develop ideas outlined or latent in MacCormick’s work and to demonstrate how these move legal positivism away from sociological positivism (or philosophical positivism) and

consequently manifest a rupture with the Hartian Tradition of empirical theorising.

Before turning to the advances made by MacCormick, we can sum up the problems faced by a British Positivist analysis of International Law in the following two propositions:

1. There is no single British Positivist Tradition.
2. Of the two major traditions available for study (Austin and Hart) *neither* is conducive to understanding PIL as Law.

There is no single British tradition in legal positivism, and there quite possibly never has been. Hobbes was an odd sort of positivist, Austin and Bentham differed as much as they agreed, British legal positivism was fractured from its inception. The same was true of legal positivism as such. However, this fracture deepened with the arrival of H.L.A. Hart. Hart re-oriented the field, abandoning the “normative positivism” of Bentham and Austin in favour of the “descriptive sociology” which now characterises

¹ In Kramer, *et al.* ed.s, *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (Forthcoming)

the orthodox (Oxford) British approach.

As Gardner has pointed out,² legal positivism is both a broad church, and a much maligned one. Before locating myself within this movement, it is first worth briefly delimiting the movement as a whole. If legal positivists are to be understood or classified as a group or a school (at least within legal philosophical debate) they must be “united by a thesis rather than merely a theme”.³ That is, it is not enough that legal positivists emphasise focus “on certain aspects of legal thought and experience (namely the empirical aspects)”,⁴ but we must also have a unifying philosophical proposition. Gardner kindly provides this:

In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).⁵

In other words, legal positivism’s prime concern is to identify what the law *is*, not what it ought to be. Of course this is *also* true of “anti-positivist” theories, as critics of legal positivism are also concerned with what the law is. However, whereas anti-positivist theories would hold that what the law *is*, is in some manner dependent on what the law ought to be, the specific claim of legal positivism is that what the law *is* is *in no way dependent upon what the law should be*. The question then becomes what to identify as law, and how best to describe it; a question which ought also to be focussed specifically on PIL.

However, although a British Positivist, Bentham, coined the term “International Law”, both Austin and (in a different, perhaps lesser, but also much more fundamental, way) Hart have rejected the idea that PIL is “Law properly so called”. As I personally begin from the presumptions that PIL *is Law* and that it is best understood from a positivist perspective, I wish to outline the methodological commitments which cause Hart and Austin to reach conclusions diametrically opposed to my own.

² Gardner J. “Legal Positivism: 5 ½ Myths” 46 *American Journal of Jurisprudence* (2001) p. 199.

³ *Ibid* p. 199.

⁴ *Ibid*.

⁵ *Ibid* p. 201.

AUSTIN'S DEFINITION EXPLORED,
BRIEFLY:

Austin sought to define law first and *then* identify its scope and limits, to determine the “province of jurisprudence”. Thus Austin’s work is primarily analytic,⁶ or conceptual, in nature. Working syllogistically, Austin concludes that PIL is *not* “law properly so called”; on two counts PIL fails to meet his definition of law, and therefore it is not law: this can cause us to question any of three things: PIL’s status as law; Austin’s definition of law; Austin’s methodology (of legal theory).

Law, according to Austin, was a *confused object of observation*, and therefore pure observation could not help to define law. His first aim is to distinguish “law, simply and strictly

so called” from things with which it “is often confounded”.⁷ That is Austin sought to clearly differentiate law from those “objects to which it is related by *resemblance* [or] ...*analogy*”. Put simply, not everything called or considered to be law actually is law, and failure to recognise and combat this leads to confusion and the failure of legal theory. Austin’s task, therefore, was to define for law “the largest meaning which it has, without extension by metaphor or analogy”;⁸ to eliminate the confusion surrounding what is to be classified, and observed, as law.

Law – the specifically legal – had to be defined before it could be observed. This is why Austin concludes that definition is the key to understanding law, and that laws properly understood as the imperative commands of a determinate sovereign provide “the key to the science of jurisprudence”.⁹ In short, Austin had to, and did, *posit* a definition of law:

A rule laid down for the
guidance of an intelligent

⁶ Austin can, perhaps, be credited with inventing the school of analytic jurisprudence, however I have chosen to reject this term on the basis of what I perceive as subsequent misuse, but at any rate because the term can too easily give rise to misunderstanding. This is because Hart (whom I see as the exemplar of empirical legal positivism, or “descriptive sociology” in his own designation) is often termed – and indeed in certain respects is – an analytic jurist. Thus, for the purposes of the present work the crucial distinction is between the conceptual and the empirical, with the possibility that the analytic in fact straddles this border denying that term utility here.

⁷ Austin, *The Province of Jurisprudence Determined*, p. 18.

⁸ *Ibid.*

⁹ *Ibid* p. 21.

being by an intelligent being
having power over him.¹⁰

For Austin, “laws or rules, properly so called, are a *species* of commands”,¹¹ and commands are significations of desire “distinguished from other significations of desire ... by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded”.¹² This gives rise to Austin’s infamous sanction based model of duty:

Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it.¹³

However, for present purposes there are two problems with Austin’s definition, though not with his methodology.¹⁴ Firstly his definition of law was unsupported and secondly, from the perspective of PIL, it was wrong.

International law is not law properly so-called according to this definition, having neither emanated from a sovereign body, nor being supported by sanctions in the event of non-compliance.¹⁵ Instead public international law is a branch of positive morality in the Austinian system, but no less a science of rules because of this.¹⁶ Nor is it necessarily less efficacious:

The given society may form a society political and independent, although that certain superior be habitually affected by laws which opinion sets or imposes.¹⁷

This is *not* a (positive) legal limitation because it is not obedience to rules posited. That is public international law does not emanate from a determinate source, and so cannot be understood as a command.¹⁸ Thus public international law forms a

¹⁰ *Ibid.*

¹¹ *Ibid.* p. 21

¹² *Ibid.*

¹³ *Ibid.* p. 22.

¹⁴ In this regard, and *contra* orthodox understandings, I would claim that it is Hart and not Austin who was methodologically naïve. However, as should be apparent, my acceptance of Austin’s *methodology* does not entail an acceptance of his *theory* on my part.

¹⁵ See *supra*, note 7, e.g. pp. 112 and 123.

¹⁶ *Ibid.* p. 112.

¹⁷ *Ibid.* p. 170

¹⁸ See *ibid.* e.g. pp. 117-8. However, it is, I believe, possible to define public international law *as law* within a(n at least) neo-Austinian model. This is because Austin accepts that the “members of a Sovereign body” are subjects in relation to that body as a corporate entity. There is no reason not to perceive this as an accurate description of (the ideal of) the relationship between independent states and the “international community”, although of course, Austin does not do so. On this possibility, see *ibid.* pp. 218-23.

branch of positive morality, this is a direct implication of the consistent application of Austin's definition of law to the data of international intercourse. It is not, however, a pejorative classification. The Austinian task, as noted is conceptual in nature. He set out to differentiate law from other normative orders, and in order to do so, he realised that he had first to define law.

A NEW BEGINNING: H.L.A. HART:

Hart develops much of his work from a critique of Austin. In short, Hart perceived Austin's work as too crude, and too dogmatic plausibly to describe a phenomenon as complex as the law or legal system. To move beyond such naïveté, Hart abandoned the method of advance definition. Consequently, Hart *does not offer* a definition of law. Speaking of, and in, the *Concept of Law*, he advises that "Its purpose is not to provide a definition of law".¹⁹ The key defect Hart perceived in Austin's work was the idea that only one kind of rule, the sovereign command, could be considered to be law. Hart disagreed as, for him, this would "distort the ways in which [laws] are

spoken of, thought of, and actually used in social life".²⁰ Austin's description was incomplete and inaccurate, he had allowed logical consistency to override empirical observation, that is, he had fallen into the classic dogmatist's pitfall. This was a mistake Hart would endeavour not to repeat.

Hart's alteration in focus, necessitated by his re-orientation of legal positivism as descriptive sociology or *elucidation* of legal concepts, is well captured by Gardner:

Hart showed how ... legal norms have no "essence" nothing that makes them distinctively legal, except that they are norms belonging to one legal system or another ... One needs to begin by asking what property or set of properties all legal systems have in common that distinguish them from non-legal systems. Only when armed with that information can one identify legal norms

²⁰ *Ibid* p. 78. Here, I believe, we see the impact of the linguistic philosophy of Hart's friend J. L. Austin; Hart, following Austin, believed that "a sharpened awareness of words [would] sharpen our perception of the phenomena". (*ibid* p. v). The observational overtones of Hart's language are revealing, Austin's work 'distorts' an object of analysis (the law) itself extant externally to that act of observation.

¹⁹ Hart H., *The Concept of Law* (2nd ed.) p. 17.

(including laws) as legal norms. One distinguishes laws ... as norms belonging to legal systems. [With all due respect to] Kelsen, one does not distinguish legal systems as systems made up of laws ... legal systems are the basic units of law.²¹

This is a paradigmatic shift in thought. Hart rejected the idea of advance definition as a technique for reaching or improving our understanding of legal concepts. Instead, he shifted the focus of analysis to the contextualised *use* of legal terminology, and claimed to be *elucidating* the underlying concepts.²² However, in order to develop and test understandings in this way the Legal System must itself be *presupposed* as the objective domain of analysis. In other words, absent a controlling definition, some other external arbiter of truth or accuracy is required, and only a legal system *presupposed as extant and legal*, can fulfil this role. The problem of course is that this technique cannot then be transferred to the legal system as such, unless *another* system (or category) is posited as providing the objective domain of analysis in

which the correct identification and elucidation of legal systems (as such) could be evaluated. In fact, Hart simply ‘smuggled in’ a common-sense *definition* of legal system; the very definition I wish to expose and problematise.

Hart does not claim that PIL is not law – in fact he recognises the possibility that it is law – but he does reject the idea of its being a *legal system*. PIL, for Hart, is merely a primitive “set” of laws, some form of normative primate requiring remedial measures to accelerate its evolution into a proper legal system: its emergence from the pre-legal into the legal world. Consequently, only two issues can be problematised: PIL’s status as law; or Hart’s methodology.

Law existed, it could be observed and described, but only by focussing upon “simple truths about different forms of social structure [, truths which] can, however, easily be obscured by the obstinate search for unity and system where these desirable elements are not in fact to be found.”²³ Observation must be given priority over dogmatic definition, and – assuming the

²¹ Gardner J., “The Legality of Law” 17 *Ratio Juris* (2004) 168, at pp. 170-1 paragraph breaks suppressed, and note omitted.

²² See e.g. *supra* note 19 p. 208.

²³ *Ibid* p. 230.

“system” in the quotation to be a legal system, as no other system seems appropriate – law as such must be conceptually separated from the legal system.²⁴

A contradiction begins to surface here, as Hart seems – to say the very least – unsure about the relationship between law and legal system. Outwith the *Concept of Law*, as Gardner suggests, Hart’s work appears to indicate that the two are inseparable, that understanding of the law is derivative on understanding of the legal system. One way to avoid contradiction would be to ignore chapter 10 of the *Concept*, to treat it as a mistake, or a red herring. But, of course, that chapter was *not* excised from the second edition, and thus we can assume Hart did not perceive it in that way. Consequently, we must consider other ways of reconciling this apparent contradiction.

²⁴ This seems to me to be the basic claim of chapter X of the *Concept*; however, Hart never talks about primitive sets of “laws”, but only ever of sets of “rules” (which seem in his analogies to cover everything from etiquette to PIL). Moreover, and more confusingly, he does at times refer to the international *legal system* but he also notes expressly “the rules [of PIL] which are in fact operative constitute not a system but a set of rules” concluding that a basic rule of recognition does not (as yet) “represent an actual feature of the system”; *Concept* p. 231.

They key lies in Gardner’s analysis itself:

One needs to begin by asking what property or set of properties all legal systems have in common that distinguish them from non-legal systems.²⁵

This “property” in Hartian analysis is the *authority* of the legal system; all legal systems are *empirically* observable as the actions of the *factually* authoritative organs (institutions) of their host societies. However, a “primitive society,” i.e. a society lacking such centralised and authoritative institutions, can nonetheless have laws. Consequently, it must be assumed that these ‘laws’ *themselves* – and individually at that – possess this stamp of authority. The contradiction can be resolved by assuming the authority of the legal system into *each individual norm* of a primitive ‘set’ of legal rules.

Hart’s methodology is particularly instructive here. Even leaving aside his *decision* to restrict his study to “municipal legal systems” as the paradigm instance of law,²⁶ we must take issue with the nature of observation entailed by Hartian

²⁵ See note 21, *supra*.

²⁶ *Supra*, note 19, p. 17.

methodology. Hart's is a theory of institutionalisation, of the centralisation of violence, and the necessity for a monopoly of both legitimate force *and* authoritative decision-making.

The absence of an official monopoly of 'sanctions', may be serious ... however ... the lack of official agencies to determine authoritatively the fact of violation of the rules is a much more serious defect.²⁷

Law in this theory is the ordered observation of official conduct; law *is* what(ever) tribunals actually do. However, this can be discovered *only if* the institution from whose behaviour law may be observed itself has a *real existence* (i.e. the institution must be a brute fact); and a real monopoly on decision and force (again, an empirically verifiable brute fact).²⁸ This is Hart's *definition* of legal system.

As Dyzenhaus notes:

Hart's account of the rule of recognition explains legal authority as an institution which comes into being to maximise the efficacy of

command structures in a complex society²⁹

In other words, Hart elides law with "deference to constituted authority",³⁰ and recognises a legal system only when the monopoly on legitimate violence is already in place and effective. Law is what officials recognise as law, no more and no less. There is no theory of the specifically legal, because Hart was less interested in the legal than the institutional: his theory is, ultimately, Hobbesian; a theory of control. Hart does not openly acknowledge the link between law and the centralised monopoly on legitimate violence, but it is the implicit condition which (alone) makes his work intelligible. The following quotes are taken from the second edition of *The Concept of Law*:

For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers. There is, of course, a difference in the use made

²⁷ *Ibid*, pp. 93-4.

²⁸ See Gardner, *supra* note 21, at p. 168.

²⁹ Dyzenhaus D. "Fuller's Novelty" in Witteveen and van der Burg (eds.) *Rediscovering Fuller* 78 at p. 94.

³⁰ The phrase is Fuller's, and comes with the warning that law must *not* be confused with such deference. See *The Morality of Law* p. 106.

by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular conclusion on the footing that a particular rule has been correctly identified as law, what they say has a special authoritative status conferred on it by other rules. (101-2)

The assertion that it [the rule of recognition] exists can only be a question of fact (110)

its [the rule of recognition's] existence ... must consist in an actual practice (111)

So, the rule of recognition is a *fact*: the question of whether a rule of recognition exists and what its content is ... is regarded throughout this book as an empirical, though complex, question of fact. (292)

Its existence is identified (and its content verified) by actual observation of the conduct of system officials (especially judges). *But*, what makes someone an official, and what *creates* a Legal System?

From the inefficacy of a particular rule ... we must distinguish a general disregard of the rules of the

system. This may be so complete in character and so protracted that we should say ... it never established itself as the legal system ... or ... that it had ceased to be the legal system (103)

One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious. (104)

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. ... those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and ... its rules of recognition specifying the criteria of legal validity ... must be effectively accepted as common public standards of official behaviour by its officials. (116)

The existence of a legal system, therefore, is *also* a question of fact (efficacy). The fact in question must be the official monopoly on legitimate violence, primarily in terms of determining *when* it may be deployed, but also in holding a *de*

facto monopoly on its actual deployment. A legal official is one *empowered* under such a (factually extant) legal system to access the monopoly on official violence. A legal ‘rule’ then becomes any condition under which the official may access that violence. This is summed up by Raz’s claim that “the concept of law is not a product of the theory of law.”³¹ This is a strong *ontological* claim. Law, the concept of law, has a real existence, it effectively *is* a brute fact. Thus, the concept of law (for Hartians) resides *outside* legal theory, and the latter exists to describe the former.

The concept of law is a way of understanding (interpreting) official behaviour. The legal system is the union of primary and secondary rules, unified by a rule of recognition. The rule of recognition tells us how other legal norms are to be identified (recognised):

This [the rule of recognition] will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by

the social pressure it exerts
(94)

These “features” are identified inductively, they are the features which judges typically accept as distinguishing legal from other rules in any given system. Thus, for Hart, law *is*, and law is what legal officials consider it to be. Law is discovered by observing, classifying, and understanding the activities (and rhetoric) of legal officials. Moreover, the rule of recognition is based on the *assumption* that a consistent agreement on the “set of features” which distinguishes and identifies a legal rule will be empirically identifiable within the actual practices of actual judges.

In short, “[f]or Hart, the foundation of any legal system is an observable rule of recognition that guides official behaviour in the ascertainment of laws.”³² The rule of recognition *actually exists*, and is *actually observable*, it is observed in the regularities of official conduct, the law – in its counter-factual existence – is the *product*, the effect, of these regularities, thus it cannot be their cause. In primitive, or pre-legal,

³¹ Raz “Two Views of the Nature of the Theory of Law: A Partial Comparison” in Coleman J. (ed.) *Hart’s Postscript* 1 at p. 36.

³² Kramer M., “The Rule of Misrecognition in the Hart of Jurisprudence” 8 OJLS (1988) 401, at p. 406.

societies, law can still exist, but it cannot do so counter-factually. In other words, in such societies, the *existence* of laws is real, and is to be ascertained from the empirical regularities of *actual conduct*. A legal rule exists where its subjects actually modulate their behaviour according to its demands; should this actual regularity wither, so would the rule. The rules have no distinct ontological status, only empirical existence, and when they can no longer be empirically observed, they no longer exist. “The rules of the simple structure are, like the basic rule [the rule of recognition] of the more advanced systems, binding if they are accepted and function as such.”³³

SUICIDE CLUBS: MINIMALISM: & THE FETISHISATION OF LAW:

Hart’s theory is presented by Simmonds as “minimalist”, in that it seeks only to “frame” or “clarify” debates. Both seem to agree that the purpose of the concept of law is to “adequately reflect the features of the social phenomena of law that are most important and distinctive”.³⁴

³³ Hart, *supra*, note 19, at p. 230.

³⁴ Simmonds N., “Bringing the Outside In” 1993 OJLS 147, at p. 154. It does, however, minimalist thesis or not, seem worth noting that in both Hart and Simmonds’

Therefore the theorist needs an “evaluative perspective” from which to engage in this “clarificatory exercise”.³⁵ And, “Hart seeks to find a suitably minimal perspective in the need for survival”.³⁶ Simmonds is at pains to point out the minimalist nature of this perspective (we can all agree on the desirability of human survival, so the claim can be widely assented to) and the *importance* of Hart’s claim to be merely clarifying the phenomena; not evaluating, critiquing, or advancing it:

The concept is perspicacious because and in so far as it reflects features of the social phenomenon of law that are distinctive and important when judged from the viewpoint of a concern for human survival. Such a concern is sufficiently widespread to be shared by all participants in the debate about juridical duty.³⁷

Or, as Hart puts it, “our concern [in theorising law] is with social arrangements for continued existence, not with those of a suicide

presentation, the “social phenomena” of law seem to exist – *as law* – outside of legal theory. Indeed law, itself, *as a social phenomenon* appears to exist outside legal theory, as a real object, simply awaiting discovery and description; like an uncharted island patiently awaiting mapping.

³⁵ *Ibid* pp. 154-5.

³⁶ *Ibid* p. 154.

³⁷ *Ibid* p. 156.

club.”³⁸ However, it is *within* this “minimalist” claim that the fundamental error, or confusion, lies: the elision between law and human survival. Of course Simmonds is correct to claim that we are all (or at least, I strongly suspect most of us are) concerned with human survival, however, that need not make human survival relevant to debates over *law*. To make the point bluntly, even flippily, we *remain concerned with human survival* while we discuss the relative merits of varying brands of chocolate, *but* that concern is not germane to the debate, as it would be germane to a debate on governance or war (as *opposed*, perhaps, to the *legal regulation* of either).

Thus the assumption Hart *actually* makes is less obviously minimalist than Simmonds claims; this is the assumption that law is *necessary* for the maintenance of human survival: that, absent law, we would die in a war of all against all. In the Marxist sense, Hartian scholars *fetishise* the law.³⁹ In other words, Hart’s Hobbesian assumption, that imposed

³⁸ Hart, *supra* note 19, at p. 192.

³⁹ Fetishisation in this sense is the ascription of properties to an object or system which does not in fact possess or inculcate them; it is a prelude to reification, the objectification of social relations as natural facts. For a simple introduction, see Collins H. *Marxism and The Law*.

order is necessary to human survival, is augmented by a legalist assumption that only *law* can bring about that order. This appears to contain the corollary assumption that *any* regulatory regime which brings about (imposes) order is *automatically, definitionally*, a legal order, law and a legal system.⁴⁰ That, however, is very much a non-minimalist assumption, it is a huge and debateable assumption, albeit one subsequently *presented as a truism*.

In other words, Hart’s theory does not merely elucidate legal concepts. Instead, it *defines* a legal system: it defines the data against which legal theory should be evaluated. But the very existence of that definition renders the theory contingent: in terms of Simmonds’ (false) dichotomy, Hart’s theory is “maximalist” and thus persuasive only to those who share its substantive commitments.⁴¹ It is *not*

⁴⁰ In his famous debate with Fuller, Hart went so far as to affirm that, in his view, even the Nazi system of government was a legal system, albeit a bad one; see Hart H.L.A. “Positivism and the Separation of Law and Morals” 1958 *Harvard Law Review*.

⁴¹ An alternative way of looking at this would be to recognise that Aquinas’ theory was, probably, in Simmonds’ terms, a *minimalist* theory in its own time. The *assumptions* which form Aquinas’ “perspective” were probably sufficiently orthodox to be understood as “sufficiently

a neutral epistemic grid through which the contents of any given legal system must be identified; because the idea of a legal system – the data of the enquiry – *is* constituted by the act of observation: the concept of law (i.e. the definition which, necessarily, *precedes* the identification and elucidation of the legal system) *is* a product of legal theory.

However, from within his own methodological protocols, Hart is correct, PIL is not a legal system. But this tells us only that Hartian methodology, whatever its other merits (if any), is inappropriate to the study of PIL. Moreover, and more importantly, Hart's theory cannot even provide an intelligible understanding of the contents of a legal system *according to its own definition*.

LAW UNDERSTOOD AS A BRUTE FACT DOES NOT ADEQUATELY REDUCE COMPLEXITY:

To understand law as necessarily enforced is an attempt to reduce the complexity of reality so that legal

norms might be identified. This identification is to be validated not by its utility, but by its empirical accuracy. It will allow us accurately to identify the legal norm applicable to a given case; and to justify that choice by reference to its empirical accuracy, *not* its substantive appeal. The law is presented as an empirical fact (enforced decision) which may be empirically observed. This technique allows theorists to identify law by reference to the actions of those institutions, courts, whose decisions are enforced: the enforced decision becomes law, an extant legal norm. Social practice methodology, to remain 'pure' or consistent, must treat all such decisions as equally valid extant legal norms.

From this perspective, the ontology of the norm is almost empirical. The norm is, in effect, a speech act, it comes into being at the point of its articulation; it can then be treated as a fact. The legal system is the composite of these facts, these legal norms manifested as legal decisions. The legal decision does not merely reflect, or even embody, the legal norm; it *becomes* the legal norm. Moreover, the arguments which led to the 'recognition' of this legal norm, having been recognised by the

minimal" for widespread agreement. What this highlights – and what Simmonds and Hart ignore – is the *contingency* of general agreement, the self-referentiality of orthodoxy. On a related note, see note 86 and accompanying text, *infra*.

judge,⁴² become (or are confirmed as) licit legal arguments, valid argumentative techniques, constituent parts of the “grammar” of (that) legal practice.⁴³

Subsequent legal arguments are then constructed by applying a choice of these legal argumentative techniques to a choice of extant legal norms; to produce a logically entailed ‘chain’ of decisions pointing to the applicability of a particular ‘norm’ to the instant case. The judge then chooses from amongst these norms, based I would argue (alongside Legal Realism and Critical Legal Studies (CLS)⁴⁴) upon

nothing more than personal preference, even if the judges themselves remain ignorant of that fact:

It only shows the inevitability of political choice, thus seeking to induce a sense that there are more alternatives than practitioners usually realise, that impeccable arguments may be made to support preferences that are not normally heard; that if this seems difficult through the more formal techniques, then less formal techniques are always available – and the other way around.⁴⁵

This is analogous to MacIntyre’s refinement of the emotivist claim, whereby emotivism is transposed from a theory of meaning into a theory of *use*, and where:

Meaning and use would be at odds in such a way that meaning would tend to conceal use. ... Moreover the agent himself might well be among those for whom use was concealed by meaning. He might well, precisely because he was self-conscious about the meaning of the words that he used, be assured that he was appealing to independent impersonal criteria, when all that he was in fact doing was expressing

⁴² This refers, specifically, to the judge in the institutional sense (and location) of the word: the authorised decision-maker *cum* law cognisor; the institutional privileged *locus* of decision. It does not refer to the abstract paradigm of the judge, as the embodiment of the legal ought. Nonetheless, the implicit and underlying argument of this paper, is that the decisions of the ‘actual’ judge, are legally legitimate only to the extent that they correspond with those of the abstract paradigm.

⁴³ Koskenniemi, *From Apology to Utopia*, 563.

⁴⁴ CLS, perhaps best understood as a reincarnation and development of the American Legal Realist project, offers a wide ranging critique of the functioning of legal orders, focussing on their outcomes, innate biases, and most famously, on the claim that law is radically indeterminate. For an introduction to CLS in international law, see Beckett J. “Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project” 2006 *German Law Journal* 1045; for a more general introduction to CLS see Kelman M. *A Guide to Critical Legal Studies*.

⁴⁵ Koskenniemi, *supra* note 43, p. 602.

his feelings to others in a manipulative way.⁴⁶

In effect, this leaves judges with an almost unlimited discretion to choose the norm which will ‘control’ or ‘determine’ their decision. Hart *assumed* that this discretion would be controlled by the judges as a collegiate body, that their decisions would be consistent, and thus produce an obviously visible set of rules by which norms were consistently recognised (the rule of recognition as empirical fact):

The rule of recognition actually accepted and employed in the general operation of the system ... could be established by reference to actual practice: to the way in which courts identify what is to count as law (108)

Hart was wrong.

The rule of recognition, understood as an empirical fact, does not determinately identify what is to count as a legal rule or norm. There *is* no self-evident core of reason unifying and systematising legal systems understood as brute facts. Judicial discretion is *not* limited by previous judicial decisions, but is

rather a *result* of the multiplicity of previous judgments.

This can be demonstrated by a comparing Unger’s CLS inspired critique of dogmatic legal analysis, with MacCormick’s defence of the Hartian project in the face of the CLS attack. Thus, where Unger calls for a process of “mapping and critique” of the legal order, MacCormick defends and refines the Hartian approach, claiming that legal theory is (or should be) engaged in a process of “rational reconstruction”:

Give the name *mapping* to the suitably revised version of the low-level, spiritless analogical activity, the form of legal analysis that leaves the law an untransformed heap ... a requirement for the accomplishment of this task is that we resist the impulse to rationalise or idealise the institutions and the laws we actually have.⁴⁷

This would appear to be the logical conclusion, or perhaps the *reductio ad absurdum*, of the Hartian project of descriptive legal theory: a non-evaluative description of legal practice. However, such a process would illustrate confusion and contradiction, not rational order:

⁴⁶ MacIntyre A., *After Virtue*, p. 14.

⁴⁷ Unger R. *What Should Legal Analysis Become?* pp. 130-1.

Legal doctrine produced in this way degenerates into mere casuistry where it purports to reconcile and work in every single case and statute in some grand scheme; there has to be some discrimination between the parts that belong in the coherent whole and the mistakes or anomalies that do not fit and ought to be discarded.⁴⁸

Instead of this, the work of rational reconstruction:

Calls for the exercise of creative intelligence and disciplined imagination to master the large and always changing bodies of material involved, to grasp them all together [presumably with the ‘necessary’ excisions already having taken place], and to reconstruct them altogether [except the excised pieces] into systematized and coherent wholes.⁴⁹

In short:

Normative order as order is not a natural datum of human society but a hard won production of organizing intelligence ... the raw materials don’t bear any one clear scheme on their

face. Of course they don’t. The juristic task has always been to establish intelligibility, not merely to discover it.⁵⁰

In other words, MacCormick, *contra* Unger, recommends that we *indulge* “the impulse to rationalise or idealise the institutions and the laws we actually have”. However, the empirical theorists are then confronted with the limit point of their own theorising. Absent its informing values, the empirical evidence does not support a consistent set of criteria for the identification of legal norms. Instead this must be imposed according to the desires of the theorist’s “*creative intelligence and disciplined imagination*”. Nonetheless,

MacCormick can conclude:

In a modern state, the continuing intelligibility and operability of law depends crucially on its continuing servicing by academic commentators as well as by practitioners and judges.⁵¹

Yet, by MacCormick’s own admission, such a process must be arbitrary: it cannot take all available data into account, and yet can admit of no informing values by which the

⁴⁸ MacCormick N. “Reconstruction After Deconstruction: A Response to CLS” 1990 OJLS 539 at p. 556.

⁴⁹ *Ibid* p. 557.

⁵⁰ *Ibid* pp. 557-8.

⁵¹ *Ibid* p. 558.

choice of which material to excise could possibly be justified. This is *precisely* the charge Dyzenhaus levels against contemporary legal positivism.⁵² MacCormick has in effect *conceded* the impossibility of the Hartian descriptive project. The rationalising process is indeed “mere casuistry”, and *ex post facto* casuistry at that. But that fact is disguised and denied “by academic commentators as well as by practitioners and judges”; and that *denial* constitutes the “continuing intelligibility and operability of law”.

Consequently, the dynamics of perception must be resolutely reductivist in function. The first reduction is that from the overwhelming data of pure existence to the isolation of institutional behaviour. This may be presented as a mere identification of the relevant data, but is, in fact, the construction of the practice ‘identified’. However, even once that is accomplished, the ‘fact’ of the social practice *constituted* by this structured and reductive observation, will remain too complex to facilitate rational exposition, ordered presentation, and predictable responses.

Instead, we require *three* consecutive processes of data reduction, identification, and ordering, which operate cumulatively to make the rational ordering, the rational reconstruction, of law as a social practice *appear* possible. *First* cognition is limited to the actions of those who constitute “authoritative decision-makers”; this delimits the social practice. *Second* a distinction is drawn between winning and losing arguments; this purifies the data (in a manner analogous to what Cover has termed the “jurispathic” function⁵³). *Third* a final set of exclusions are enacted *amongst the winning arguments*, in order to create the impression that these can be understood as a coherent whole. Only then can we ‘identify’ ‘chains’ of cases giving rise to ‘recognised rules’.

Unger captures this move, and its disguise behind banality, when he recognises legal analysis as a “spiritless analogical activity”.⁵⁴ He then seeks to expose its true nature to light. The radical banality of Unger’s ideal of “mapping” is to highlight the process of task *evasion* inherent in rational reconstruction or

⁵² Dyzenhaus D., ‘Positivism’s Stagnant research Proposal’ 2000 OJLS 703, at p. 711-2.

⁵³ Cover R., “*Nomos* and Narrative” 97 *Harvard Law Review* (1983) 4 at p. 40.

⁵⁴ *Supra*, note 47.

paradigm case methodology. The banal radicality of the process is to bring to light the full impact of a task normally considered banal, the doctrinal analysis of legal systems, the imposition of order through exclusion, the nature of “reconstruction” as *creation*. That is the utter impossibility of empirical analysis, and the delusion which disguises value imposition behind a claim to describe what “is”.

The Relationship Between Municipal and International Legal Theorising:

Hart stipulated that the task of legal theory was to “provid[e] an improved analysis of the distinctive structure of a municipal legal system”⁵⁵ and from this, to develop an enhanced understanding of law as such. Consequently, municipal law formed, and continues to form, the paradigm of legal theorising. Almost all theory of international law simply develops, transposes, or transplants municipal legal theory to the alien environs of international life.

Schematically speaking, theorists, black letter academics, and practitioners of international law, transpose – or probably more

accurately transplant⁵⁶ – assumptions about the “nature of law”, from the theory and practice of municipal law to the alien environment of international society. Thus, Koskenniemi is correct to draw attention to:

The domestic analogy that persuades us – contrary to all evidence – that the international world *is* like the national so that legal institutions may work there as they do in our European societies.⁵⁷

Two problems arise as a result: first municipal law is not, itself, a coherent, nor an unproblematic, concept;⁵⁸ and second PIL is *not municipal law*. This is not necessarily problematic, but can become so when institutional centralisation is posited as the defining feature of the legal system. This is so for two reasons: firstly, PIL is not an

⁵⁶ The, very useful, distinction between transplanting and transposition was developed, and is elucidated, by Esin Orucu; see “Law as Transposition” 51 ICLQ (2002) 205.

⁵⁷ Koskenniemi M., “International Law in Europe: Between Tradition and Renewal” 16 EJIL (2005) 113, at p. 122.

⁵⁸ See Kammerhofer J., “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems” 15 EJIL (2004) 523 at p. 550; see also Kletzer C., “Kelsen’s Development of the *Fehlerkalkul*-Theory” 18 *Ratio Juris* (2005) 46.

⁵⁵ *Supra*, note 19, at 17.

institutionalised legal system, and secondly; because of that fact, the problems inherent in descriptive legal theory are greatly exacerbated in PIL. As a corollary point, the problems are more easily identified in PIL. Consequently, the relationship between the two branches of theory ought to be conceived as symbiotic, rather than a uni-directional transfer of knowledge from the “advanced” municipal orders to the “primitive” international order.

This becomes obvious if we think about the (necessary) three stage process of reduction outlined above. The first stage is the most awkward, because there *are* no centralised institutions by reference to which the data can be ‘identified’ (purified and reduced). This is why PIL cannot be a legal system in the Hartian sense: legal *systems* are necessarily (definitionally) institutionalised forms of social control.⁵⁹

Instead, empirical theorists of PIL must turn their attentions to the actions of “authoritative decision makers”.⁶⁰ This identifies a vast

category of relevant data. To make matters worse, the absence of centralised institutions *also* subverts stage two of the process of reduction: there are no courts (of compulsory and general jurisdiction) by reference to which the distinction between winning and losing arguments can be identified:

there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law.⁶¹

Consequently, only the third stage of the process – the most radically under-theorised stage – is actually active in PIL. The ‘reconstruction’ of the legal system becomes a *construction* of the legal system, and *that* creates the “personalisation”, the descent into idiosyncrasy, of PIL.⁶² The indeterminacy which gives rise to this personalisation is inherent in the empirical (‘British positivist’) methodology, but is more apparent in PIL, where it is less likely to be disguised by institutional centrality,

Problems and Process: International Law and How We Use It pp. 1-16, esp. pp. 9-11.

⁶¹ *Legality of the Use of Force (FRY v. USA) Preliminary Objections* ICJ Order of 2nd June 1999 para. 30, 1999 ILM p. 1188 at p. 1195

⁶² See Beckett J. *The End of Customary International Law?* (Forthcoming) esp. ch. 4.

⁵⁹ See notes 25-30 and accompanying text, *supra*.

⁶⁰ For a sympathetic, but nonetheless useful, account of this notion, see Higgins R

authoritative decisions, institutional bias, and the continued (and *consistent*) servicing of academics and practitioners.

TWO VIEWS OF THE LEGAL SYSTEM:

There is no necessary reason to understand law as enforced, nor as socially central, nor indeed as a social practice or a social institution. These commitments may well combine to form the orthodox perspective within legal theorising, but that in itself grants them no virtue, as it offers them no support beyond the “staying power” of orthodoxy. Social practice theorising precludes law from meeting the standard of rational determinacy. There may be good reasons for accepting that outcome, but definitional fiat does not rank among their number.

Law can be understood differently, as an ideal idea⁶³ structuring,

⁶³ The ideal idea is a concept which I have adopted from Jörg Kammerhofer (see Kammerhofer J., “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems 15 *EJIL* (2004) 523 at 544) however, we deploy this term in slightly different senses. His is more Platonic, relying on an abstract realm of the ideal, and in particular on the ideal ontology of norms; whereas my use of the term refers to the *human construction* of ideals, which can then form essences, or categories in the semantic sense.

justifying, but imperfectly reflected within, a social practice: law as the *reason for* judicial decisions, not merely the *fact of* judicial decisions. Consequently, there are (at least) two possible understandings of law, and these give rise to two quite different views of (what constitutes) ‘the legal system’.

1. Law as a social practice.
2. Law as an Ideal Idea.

From the first perspective, law is what judges say the law is. Consequently, all extant judgments must be understood as brute facts; and these brute facts (the texts of the judgments, the arguments accepted by the Court as legal arguments, the techniques acknowledged by the Court as constitutive of legal norms) in total *constitute* the ‘legal system’. The task of the ‘lawyer’ is to select from amongst these facts, seeking those most suitable to constructing the argument their ‘client’ desires. But, of course, these ‘facts’ do not form a coherent system. Consequently the task of the judge is to make a free choice between the competing arguments (and then deny that this has occurred), and the task of the ‘orthodox’ academic is to aid

and abet this disguising and denial of the fact of judicial decisionism.⁶⁴

From the second perspective, the law is not a brute fact. Consequently, the texts and ‘facts’ and decisions which constitute the legal system in the first analysis are, at most, evidence of the underlying ideal of law. Instead, each legal argument is understood as the manifestation of a particular theory of law. From this perspective, the law is an ideal idea, a direct product – an actualisation or realisation – of the underlying theory of law. The legal system is understood as a manifestation of the dominant theory of law. The legal system too is an ideal idea, the idea which ought to structure, or even determine, the judicial decision; *and* define the actions which may be acknowledged as law constitutive, and the argumentative techniques which may be acknowledged as *legal* arguments. The critical question is how to decide which theory to adopt as dominant.

However, when law is understood as a social practice, this question regarding the ideal idea cannot be brought into focus. This is because it precedes the legal judgments, and the judgments *themselves* are understood as ‘the law’. Consequently, the ‘problem’ of indeterminacy, whose existence seems incontestable within the arena of social practice, cannot be resolved within that arena. The solution, therefore, must lie, at least initially, with the full articulation of the decision the judge must actually make. The decision as to *which ideal idea* to endorse, which definition of law to concretise into the legal norm.

As there are no “agreed criteria” for legal decision-making, it is delusional to assume that judges apply such criteria.⁶⁵ Instead they must, implicitly, choose between different, contesting, and irreconcilable visions, or *theories*, of law in order to reach their decisions. However, such theories are merely implicit in the legal arguments actually offered; hence the *silence* of the “prologue”,⁶⁶ the unarticulated nature of the theoretical assumptions driving the argument.

⁶⁴ Ricouer eloquently denounces this strand of positivism as “the complicity between the juridical rigidity attached to the idea of a univocal rule and the decisionism that ends up increasing a judges discretionary power” see, ‘Interpretation and/or Argumentation’ in Ricouer P., *The Just* 109 at p. 114.

⁶⁵ Carty A. *The Decay of International Law* p. 25.

⁶⁶ Dworkin *Law’s Empire* p. 90. See also notes 74-5 and accompanying text, *infra*.

Even *within* the arena of ‘social practice’ these inarticulate theories are being deployed and decided amongst. They ought to be brought to light. This will entail only an *apparent* widening of legal argument, to encompass legal theory. In practice, legal argument and legal decision-making already encompass legal theory. That this fact goes unacknowledged does not make it untrue. Consequently, the fact should be engaged, and its implications contended with.

This allows us to understand the true nature of ‘technical legal analysis’ – of the masquerade of the empirical – which is, in reality, no more than a random selection of ‘extant’ norms; understood as the brute facts of articulated legal judgements, which MacCormick terms “the large and always changing bodies of material involved”. The collections presented as identifying the applicable norm owe nothing to internal logic, but gain their force from the substantive appeal of the norm itself. If we reject (or at least bracket) Dyzenhaus’ thesis on structuring this substantive preference through the imposition of a substantive morality,⁶⁷ the question

ought to turn to the ‘criteria for collection’ themselves. Focus should be directed to the *reasons for inclusion* within the rational reconstruction, and *not* on the ‘data’ from which that material is to be selected, especially as that ‘data’ is itself *constituted* by the legal theory adopted, which is in turn a manifestation of those ‘criteria for collection’.

The key point is that *both* orthodox responses to the deficiencies of the social practice method are, themselves, pathological. The British legal positivist response does not engage the real problems, but functions in denial. Consequently, it serves merely to perpetuate the problems. The natural law response retains the hubris of moral imperialism.⁶⁸ Neither response should be adopted. Despite being presented as exhaustive of the field of possibilities, these theories do not, in fact, constitute our only available options. Instead, we could abandon social practice methodology.

MacCormick offers a way out of this dilemma; albeit one he does not take, nor even adequately develop. MacCormick is, undoubtedly, correct

⁶⁷ Dyzenhaus, *supra*, note 52.

⁶⁸ See Beckett J. “Behind Relative Normativity: Rules and Processes as Prerequisites of Law” 2001 EJIL 627.

that the key is to further reduce the data. Moreover, with all due deference to the contingency of the tautology, it stands to reason that this should be done rationally rather than irrationally. However, this merely poses the key question, it does not resolve it. That question is: how ought we to *substantivise* the rationality structuring the rational reconstruction? What I am developing is a specific technique to accomplish this legitimately; a technique to ‘operationalise’ MacCormick’s theory.

In doing so, I am merely drawing the disparate strands of MacCormick’s own arguments together. The structure of an operative rational reconstruction is best developed from the choice between competing legal theories, themselves understood as (manifestations of) thought objects. This amounts to an immanent completion of MacCormick’s own project.

THE NATURE OF LAW

MacCormick argues that law should be understood as an “institutional fact”. This idea, expounded at length by MacCormick and Weinberger as

the Institutional Theory of Law,⁶⁹ is encapsulated by the former’s insistence that law is a “thought object”, and that these:

Exist by being believed in, rather than being believed in by virtue of their existence.⁷⁰

The central focus is on the question of what law is, on how we identify the raw data for legal theory. This is a second order question, thus the concern is not with what the law says, nor with what legal rules, ideas, or norms mean. These are first order questions, but they depend for intelligibility on the second order question, what makes the law law (what counts as law)? From what data do we identify what the law says?⁷¹ How do we recognise legal rules, ideas, or norms? What is law?

There are two distinct ways of answering this question, the descriptive and the normative; and consequently two distinct ways of

⁶⁹ MacCormick N. and Weinberger O., *The Institutional Theory of Law*.

⁷⁰ MacCormick N., ‘The Ethics of Legalism’ 2 *Ratio Juris* (1989) 184 at p. 191.

⁷¹ Whilst this problem is particularly apparent and acute in PIL, no convincing reason has been given (to my knowledge) as to why municipal law theorising should focus exclusively on the (higher appeal) Courts, rather than, e.g. prosecutors, contract lawyers, or even policemen.

understanding law as an institutional fact. We can accept a fixed, natural, existence for law in institutional practice, (law – or at least legal system – as brute fact) and then judge theories by their correspondence to this. *Or*, we can accept that law is an ideal, and thus outside of institutional practice, an ideal which legitimates institutional practice, and therefore provides a point of critique for institutional practice (law as thought object).⁷² Hart takes the former route, I am advocating the latter; MacCormick provides an ambivalent median, or perhaps is simply unwilling to take sides.

Nonetheless, MacCormick, has indicated another way of conceiving of law's "institutional existence". By taking legal counter-factuality seriously – as MacCormick does – we can (*contra* the Hartian in MacCormick) 'de-institutionalise' law (and thus also de-institutionalise the rule of recognition as law's empirical identifier) and focus on pedigree and form to provide a *duty* to recognise norms based on *law* (however defined) and *not* on *power* (however

imposed) as an institutionalised form.

Despite being widely regarded as one of Hart's most acute critics,⁷³ Dworkin also maps neatly onto this debate. Dworkin's theory elides law and adjudication, claiming that legal philosophy is the "silent prologue" to adjudication:

Jurisprudence is the general part of adjudication, silent prologue to any decision at law.⁷⁴

Consequently, the role of legal philosophy is to identify this "silent prologue", through analysis of adjudication. In perceiving legal philosophy as the prologue to adjudication, Dworkin appears to suggest that we privilege the thought object, and our understanding of this determines our identification of legal rules (definition preceding description). In Dworkinian terms, focus on the law as such constitutes the "preinterpretative stage".

However, in reducing this prologue to silence, Dworkin then makes the opposite move, privileging the actual

⁷² See Beckett J., "Countering Uncertainty and Ending Up/Down Arguments: *Prolegomena* to a Response to NAIL." 2005 EJIL 213

⁷³ See e.g. Hart, *supra* note 19; esp. the "Postscript"; and Dworkin R. *Taking Rights Seriously*.

⁷⁴ Dworkin, *supra* note 66.

institutional behaviour. In both cases, the thought object still exists, but in the former it speaks for itself while in the latter it can only be identified through an analysis of institutional behaviour, hence its “silence”. “We may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given”.⁷⁵ In other words, for all practical purposes, the law remains for Dworkin what it is for Hart, a matter of *social fact*; an object susceptible to empirical identification.

The patent disadvantage to the empirical approach is that it *does not work*. This is so on several levels. The project is impossible on its own terms, empiricism inexorably relies on categorisation and definition; denying this does not prevent it. Absent such techniques of classification, empiricism would degenerate into unintelligibility.⁷⁶ Consequently, a definition of legal system – the exercise of authoritative and socially central decision-making – must be ‘smuggled in’. The law *can* then be derived from this definition;

but the process becomes contingent rather than necessary.

Moreover, the ‘chosen’ definition *fails* to adequately reduce complexity. The category of decisions is too vast and too disparate to be unified under a functional rule of recognition. Instead, the process relies on further acts of reduction. The second stage – the distinction between winning and losing arguments – is not only absent in PIL, but inadequate in municipal law. As a result, it is the third and final process of reduction which is vital. However, this process is not theorised by British positivists, and the natural lawyers resolution is normatively objectionable. This is where the understanding of law as a thought object or ideal idea comes to the fore.

This perspective allows us to realise that the legal decisions which the empirical approach takes to be the raw data of legal theory, are in fact the products of legal theory. Moreover, the legal system is a composite of these products. However, the norms are not produced by reference to one dominant or orthodox theory, but are in fact a mixture of different, incompatible, and *competing* legal

⁷⁵ *Ibid* p. 66.

⁷⁶ MacIntyre A. ‘Epistemological Crises, Dramatic Narrative and the Philosophy of Science’ 60 *The Monist* (1977) 453, at pp. 462-3.

theories.⁷⁷ The absence of an orthodox theory means that each norm is chosen for its substantive appeal in the instant case. Yet, surely, the whole point of law is to move away from discretion of this type:

It [internalised value conflict] compels the move to "discretion" which it was the very purpose to avoid by adopting the rule-format in the first place.⁷⁸

As a result, the final stage of reduction must be more carefully theorised. What MacCormick's work on the institutional theory of law allows is a new (and better) understanding of this process. The law can be made coherent by adopting a single orthodox theory (for each legal system). The theory can be chosen for its formal appeal, its appeal as a general theory, not the desirability of the norms it produces in any instant case. The final stage of reduction (the only functioning stage in PIL, the only important stage in municipal law) can be structured and made determinate *only* by adopting such an orthodox theory.

The final point I must demonstrate is the preferability of a form of

positivism to play the role of orthodox theory.

The Formal Purpose of PIL/CIL and its Ontology is *Not* The Same As The Substantive Purpose of the System and its Deontological Content:

Dyzenhaus is correct that law *as such* must be understood purposively.⁷⁹ Absent a purpose we have no way of justifying our choice of the phenomena we will observe under the name of law. Mere "empirical accuracy" cannot be a criteria of success if the theory itself can define the relevant empirical data against which the accuracy of description is to be evaluated.⁸⁰ This would leave positivism in danger of irrelevance, pursuing a strained analysis of its own stipulated (but unjustified) objects of observation. Only by engagement with purpose – with the reason for having law at all – can we justify the choice of phenomena to be observed, and justify unifying this observation under the name of law or legal system. Law must be defined to be observed, and purpose is required to bring determinacy and justification to the definition offered.

⁷⁷ Beckett, *supra*, notes 62 and 72.

⁷⁸ Koskeniemi, *supra*, note 43, p. 592.

⁷⁹ *Supra*, note 52.

⁸⁰ See note 71, *supra*.

Moreover, Dyzenhaus *may* also be correct that any coherent theory of adjudication must attribute an overall purpose to the legal system being analysed. That is, the application of law *also* presupposes that law have a purpose. Naturally, this is disputed by the hard positivists, for them judicial discretion takes the place of the overall purpose of a legal system.⁸¹ This, as Dyzenhaus disparagingly notes, would leave legal theory with the task of merely describing the exercise of an unconstrained judicial discretion; rather than structuring or evaluating, or even predicting judicial application of the law. Thus any theory of adjudication seeking to constrain judges must posit an overall purpose for the legal system within which those judges operate. This is the concession soft positivists offer to the identification thesis, that the identification of (the content of) norms in moments of relative indeterminacy may be subject to moral criteria.

Thus the understanding of law as such must be purposive, *and* the identification of legal norms (at least in hard cases) requires a purposive

understanding of the legal system. So, Dyzenhaus concludes, if the identification of law is a purposive practice and the definition of law is also a purposive practice, then the concession in the identification thesis must inexorably create a like concession in the separability thesis. This means that the separability thesis can no longer be maintained, and the moral nature of law must be conceded.

But this is simply not so. That both law (as such) and each legal system require recourse to their posited purpose to be fully understood does not in any way imply that each must share the same purpose. Law requires purpose at the ontological level, to identify the phenomena to be observed as law. A legal system requires purpose at the deontological level, to give determinate content to the norms already assumed to exist at the ontological level. The two operate quite independently of one another.

In other words, the positivist “claim that understandings of the point of law, which inform theories of adjudication, operate in a different conceptual space from theories of

⁸¹ Gardner J. “Legal Positivism: 5 ½ Myths” 46 *American Journal of Jurisprudence* (2001) p. 199 at p. 201.

law”⁸² the very claim derided by Dyzenhaus,⁸³ is in fact perfectly *correct*. What the law *is*, and what it is being deployed for in a particular setting *are* two different things. That we need a purpose to determine the content of some norms does not mean that this purpose also determines the form of law as such. The form of law as such may vary, but moreover and more importantly a single form for law (e.g. Fuller’s definition, drawn from purpose, and encapsulated in the eight principles) can sustain a variety of different purposes to be pursued by different legal systems.

The fact that each legal system *may* require a substantive purpose to determine the content of (some of) its norms cannot lead to a requirement that these purposes each feed into (and moralise) the abstract purpose of law as such. That the identification thesis may rely on “understandings of the point of law”, which constitute a substantive morality, does not entail that the separability thesis must give way to the same morality. Understandings of the coherence of the content of particular legal systems which inform theories of adjudication are

⁸² Dyzenhaus, *supra* note 52, at p. 709.

⁸³ *Ibid.*

deontological in effect. Understandings of the purpose of law which define the phenomena to be considered law are ontological in effect. Thus the two do, by definition, “operate in ... different conceptual space[s]”

The purpose of “law” as such is very abstract, social-engineering of some form, or the delimitation and evaluation of society. But how this will be substantivised requires focus on a second (itself more substantive) purpose, the (political) purpose pursued through the legal order. Thus the purpose of law does not determine how the law should be substantivised. It does not posit (deep enough) presumptions about the nature of man or the good life, such as would be necessary to substantivise the purpose of law as such. Yet this is exactly what Dyzenhaus is suggesting purpose does. The key is the necessity for two purposes, one to ontologically define law⁸⁴ and another to deontologically substantivise it.

That is, although he rejects authority as law, Dyzenhaus (and other natural

⁸⁴ However, this purpose is also based on a series of assumptions about the nature of people, their amenability to regulation, and the ‘parts’ available from which the legal system in question can be constructed.

lawyers) continue to assume the authority *of* law, and the absolute necessity for a unitary understanding of the form (and so for them some of the content) of law, “good for all times and all places”.

However, in Dyzenhaus’ defence, this disembodied essence is common ground, it is law’s identifying feature in observational language, it is legal common-sense. Hence the (pluralist) “politics of definition” is given prominence over a normativist “politics of decision”. This (preferred focus) manifests itself awkwardly in PIL, as the authority of law is less apparent, therefore theorists struggle to redefine “law” (away from clear rules) to preserve its “essence” (enforcement) and its definitional (paradigmatic) centrality.

This is an orthodox assumption, but it cannot be defended solely on the grounds of that orthodoxy; nor can it be defended on the ground of empirical accuracy, as it has no data outside of itself against which it may be evaluated or validated. Instead, the assumption must be analysed purposively. What is the purpose of socially central law? At first glance, the answer is obvious: its purpose is to regulate human behaviour. However, it cannot achieve this by

reference to rules, as Koskenniemi among others has shown. Socially central (definitionally authoritative) law is *necessarily indeterminate*, because this is the price for its political acceptability.

The “essence” imputed to law by common agreement is itself ungrounded, and that is why PIL theorising runs so frequently into trouble, or is dispersed as the fractured remnants of a discourse rendered fatally indeterminate by its own lack of theoretical cohesion. It is the singular point of (definitional) agreement which is itself inaccurate and misguided:

This [the commitment to centrality] may require lowering the expectations of technical certainty and increasing sensitivity to the ways in which law gets spoken.⁸⁵

This returns us to the central concern, the need to re-engage fully and openly, without prejudice or dogmatic definition (disembodied essence) with the purpose of PIL, and the role or function that PIL must perform – within an international society, however

⁸⁵ Koskenniemi, *supra* note 57, at p. 119.

defined – in order to fulfil this purpose. It is only once this has been achieved that one can show that (ideal) PIL is capable of neutral rule formation; legal norms are best understood as agreed manifestations of commonality. This provides a perspective from which *both* PIL itself (the substantive body of norms actually accepted or argued as PIL) *and* the actions of states vis-à-vis PIL can be consistently evaluated. As this ideal is also the *justification for* PIL (for the imposition of PIL as a coercive order) it carries a normative force within itself.

The purpose of PIL is to provide a baseline of *agreed* general standards for the consistent *legal* evaluation of conduct by all actors. This can be accomplished *only* within the positivist – value-neutral – system. Positivism is less *lingua franca* than *franca lingua*: not merely a language which all can speak, but a system which can speak for all. To deny this is to impose one's own moral code on the World at large; it is tantamount to the imperialist claim to *know* objective moral truth. And *that* is a denial of the very processes of abstraction and reduction through which (alone) thought is possible. That we see ourselves as 'good' is no guarantee that we are good. That our

morality appears to work for us is no reason to impose it on others.

PIL *ought* to be about the discovery – or negotiation – of commonality, not the imposition of a unitary system of right passed off as universality. Only a positivist theory can meet this challenge.

CONCLUSION

Michel Foucault's work concerns the creation of the normal from the marginal,⁸⁶ and perhaps this perspective can provide an intelligible context for the arguments above. Inherent in Foucault's claim is, I think, an acceptance of Kierkegaard's point that "the exception ... thinks the general with intense passion",⁸⁷ and its converse; that the paradigm case does not. The paradigm is *identified* by its banality, its regularity and commonness; it is hum-drum, and so, opposed to thinking. The paradigm case can *never* cause us to think about the paradigm itself; only the exception, or marginal case, can facilitate this.

⁸⁶ See, e.g. *Madness and Civilisation*, or *Discipline and Punish*.

⁸⁷ Quoted in Schmitt C. *Political Theology* p. 22.

The paradigm of legal theory is the institutional centrality of legitimate violence, the monopoly over legitimate violence which the municipal legal system claims, and by which the municipal legal system is identified. My claim is that this elision of law and the monopoly of institutional violence (the elision we call the Rule of Law⁸⁸) is the product of human choice; and moreover, of a problematic human choice at that; the agreed baseline, the orthodox elision of law and centralised force is *wrong*. At the very least, this elision should be opened to critique, rather than transcendently posited and shielded. Paradigmatic reasoning is necessarily blind to its own contingency, as “central cases” – which anchor reasoning – are defined by the presence of the paradigmatic features of which the paradigm is constructed, thus they can never expose the contingency of

those features. The effect is to move these features beyond critique.

If we accept the baseline of institutionalised coercion then we say – with some variation of mediation, e.g. between Hart, Dworkin, and the American Realists – that law is what is enforced; that central social institutions *are* legal institutions.⁸⁹ But this would seem to entail, as the Realists accepted, that what is not enforced is not law. To take a recent example from international law, this would indicate that the absence of enforcement, of Security Council condemnation, and of an armed or coercive reaction, *proved* that the Anglo-American invasion of Iraq was *lawful*. Yet this answer seems problematic, at the very least, when put so bluntly, it seems too glib. Perhaps then the simple absence of coercion is not dispositive of the claim to illegality.

But, *if* this is so, *if* that nagging doubt remains, then what does that fact (the continued existence of the doubt) tell us about law, or about our own attitudes to law? It is at least possible that this doubt (or “anxiety” as Heidegger might have it) begins to expose the methodological

⁸⁸ There are two ways of understanding this elision, from a Hartian perspective, the important point is that law *rules*; the rule of law is a claim of legal sovereignty. Consequently, law is taken for granted in the sense that the expression of authority is law. From the opposite perspective, consider e.g. E. P. Thompson’s claims about the rule of law (see *Whigs and Hunters*), it is ‘rule’ and *not* law which is taken for granted; law becomes the evaluative variable. The question refocuses entirely: is it rule by *law*, or rule by something else, something other than law?

⁸⁹ See Raz J, “Authority, Law, and Morality” in Raz J., *Ethics in the Public Domain* p. 236.

presumptions to light, to illuminate a hidden truth from the margin: we expect more from law than the imposition of order. I call this “more” the specifically legal. The specifically legal is that which the law has which other discourses and techniques do not; that which distinguishes, or *specifies*, the legal; that which makes it unique, and distinct from other concepts.

And it is in ignoring this more, in ignoring the specifically legal, that orthodox theories of legal positivism fail. But it is here, also, that the difference between the empirical and conceptual methodologies comes to light. The empirical methodology *had to be* wrong, whereas the conceptual methodology merely *is* wrong.

In other words, both sets of theories (the empirical as manifested in Raz, Hart, and possibly Gardner; and the conceptual as manifested in Austin and Kelsen) are wrong. Consequently, there is little point in analysing too closely what they have to say about international law as they have examined the topic back to front; anything these theories could have told us about international law is *already tainted* by the original error they transpose from municipal law. But only one methodology (Hart’s)

had to be wrong. Thus we can accept Kelsen’s methodology – that there is a “static aspect” of law, which distinguishes it from other normative orders and social practices – but reject his theory that this “static aspect” should be the relation between norm and force. This is what allows, methodologically, the conceptual approach to facilitate examination of the specifically legal.

Things are bleak for empirical legal positivism. By understanding law as having a real existence, and being capable of direct observation, empirical legal positivism limits itself to focus on the ascription of power itself. The object (law) to which power must be ascribed, is perfectly shielded from the focus of empirical legal positivism, which is so in thrall to centralised power that it is capable of perceiving nothing else. For this reason, Hart was in fact correct to claim⁹⁰ that public international law was not a legal system; but this tells us more about the methodological weaknesses of the Hartian model than it does about international law, or its status *as law*. That Hart’s definition of law is anchored paradigmatically in municipal law is one, forgivable, thing; that it, while

⁹⁰ Hart, *supra* note 19, chapter 10.

claiming to be a theory of law, overlooks even the *possibility* of the specifically legal is another matter altogether.