



'The Concept of Law' and Social Theory

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THE CONCEPT OF LAW AND SOCIAL THEORY†

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For the past twenty years, analytical jurisprudence particularly in Great Britain, but also in the United States and much of the rest of the world, has been profoundly influenced by one author and one book. The author is, of course, H. L. A. Hart; the book is *The Concept of Law*.¹ As one of the editors of the *Festschrift* to Hart has remarked, 'No serious writing upon the subjects with which Professor Hart dealt can afford to neglect his work, and the key concepts with which he was concerned will, for a long time, be discussed within the parameters he laid down'.²

Hart has, without doubt, had his greatest influence on legal philosophy. Through his masterly combination of conceptual analysis with deep knowledge of law, he has demonstrated both to philosophers and jurisprudentially inclined lawyers how much each can gain from an application of philosophical techniques to legal materials and of legal techniques to philosophical materials. However, while this might be its most obvious achievement, the importance of *The Concept of Law* does not end there. For it is a remarkably catholic work, whose relevance and insights do not fit neatly within one disciplinary pigeon-hole, or even two. A number of authors have noted, for example, that it also makes, or can be used to make, contributions to social theory, though few have tried to specify these in any detail,³ and most have acknowledged, indeed emphasized, that the general influence of *The Concept of Law* on social theory generally and legal sociology in particular has been small. Conversely, the influence of these disciplines on analytical jurisprudence, except as an occasional source of apt, or in the case of Malinowski exotic, illustration, has not been remarkably conspicuous.

Several reasons might be adduced for this. For a long time, despite its Durkheimian and Weberian ancestry, sociology had little to say about law, treating it, as Talcott Parsons recently put it, as an 'intellectual step-child',

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†An earlier version of this paper was read to a seminar of the Australian Society of Legal Philosophy in April 1981. I am grateful to the participants in that seminar, particularly Lauchlan Chipman and Wojciech Sadurski, for their comments, which have now appeared, with a reply by me, in the *Bulletin of the Australian Society of Legal Philosophy*, no 19, August 1981.

1 Clarendon Press, Oxford, 1961. Future references to passages from *The Concept of Law* will be followed by their page numbers in brackets in the text.

2 P. M. S. Hacker, 'Hart's Philosophy of Law' in P. M. S. Hacker and J. Raz eds, *Law, Morality, and Society, Essays in Honour of H. L. A. Hart* (Clarendon Press, Oxford, 1977) 1.

3 However, see E. Colvin, 'The Sociology of Secondary Rules' 28 *U of Toronto LJ* 196-214 (1978); Lloyd Fallers, *Law Without Precedent* (University of Chicago Press 1969) esp 11-22; P. M. S. Hacker, op cit 8-11.

considered less important than the economy, polity, society or morality.⁴ This is somewhat, though not altogether, less true today. Secondly, especially in English-speaking countries, many sociologists and philosophers do not read outside their own discipline, and the mere fact that *The Concept of Law* is so obviously a work of legal philosophy may well have determined whom it would influence.

A distant antipodean might also be forgiven for suspecting that there was an odd conspiracy between partisans of legal sociology and analytical jurisprudence, to minimize the relevance of one for the other, and more specifically to ignore the sociological elements, and their importance, in Hart's work and his kind of work. On the one hand, among those (relatively few) writers interested in sociological approaches to law who have noticed Hart's claim that *The Concept of Law* might be regarded as an 'essay in descriptive sociology', several have greeted it with surprise, others have rejected it, and very few appear to have treated it very seriously. Thus, in an article which seeks to persuade lawyers and sociologists to collaborate and take each other seriously, Professor Willock emphasizes that Austin and Kelsen, 'the two main modern suppliers of a definition and analysis of law, both see the need, once its nature has been established, to study its connection with other disciplines'. He adds in a surprised after-thought, 'Even H. L. A. Hart claims that *The Concept of Law* "may also be regarded as an essay in descriptive sociology"'.⁵ Again, two prominent British legal sociologists have identified as one of the reasons for the relatively late development of their discipline, the alleged fact that British courses in jurisprudence

... were of a character inimical to the development of interest in law in society research. Analytical jurisprudence and legal positivism (in particular the writings of Bentham, Austin, Kelsen and, more recently, Hart) have proved of intimidating endurance as archetypes for 19th and 20th century British legal theory. Neither sociological jurisprudence nor legal realism triumphed over positivism as they did in America. . . . Of course there have been exceptions to this. . . . But such incursions have been of tangential importance; the precepts of such writers have, almost uniformly, been 'translated' in terms acceptable to the general perspective of analytical jurisprudence.⁶

The language of this complaint does not suggest that these authors see much scope for enlightenment from any of the 'archetypes' they mention. Finally, in a more measured assessment of Hart's influence and contribution, Twining remarks that, although several contributors to Hart's *Festschrift* 'explicitly treat law as a social phenomenon, the overall impression created by the collection is that this type of work is proceeding in almost complete isolation from contemporary social theory and from work in socio-legal studies, with little overt concern with the law

4 Talcott Parsons, 'Law as Intellectual Stepchild' 47 *Sociological Inquiry* 11-58 (1977). Cf Klaus A. Ziegert, 'The Sociology Behind Eugen Ehrlich's Sociology of Law' 7 *Int'l J of the Sociology of L* 256 (1979).

5 I. D. Willock, 'Getting on with Sociologists' 1 *Brit J of L and Soc'y* 9 (1974).

6 C. M. Campbell and Paul Wiles, 'The Study of Law in Society in Britain' 10 *L and Soc'y Rev* 565 (1976).

in action'.⁷ Twining, too, mentions 'the tantalizing claim that *The Concept of Law* may be regarded "as an essay in descriptive sociology"', and he concludes:

... A sympathetic critic can be sceptical about the claim, not because it is wrong or misleading, but because the idea of a descriptive sociology of law is not developed in *The Concept of Law* nor in Hart's other writings. What, for example, is the scope of a 'descriptive sociology' and how does it relate to other kinds of sociological enquiry? Why 'descriptive' if the purpose is understanding? What within this field might be important concepts that might be usefully clarified by the kind of analysis of which Hart is an acknowledged master? Hart's individual concerns, and the intellectual tradition of academic law within which he has worked, have not led him to direct much attention to such questions. But it is important to recognise that while his focus of attention may have been relatively narrow, the philosophical techniques and approach which he has introduced into legal theory are capable of application to a much wider range of concepts and issues.⁸

If legal sociologists and sociological jurists have not been much influenced by the renaissance in analytical jurisprudence which Hart inaugurated, analytical jurists have frequently remained rather innocent of social theory and empirical social research, and have at times manifested an attitude of haughty, and not always benign, neglect towards work in these fields. Few now deny that there is a place for such inquiries, and some have insisted that it is an important place.⁹ However, they appear to have remained confident that it is a clearly different place from their own, and few show evidence of frequent visits. In this, they might be following Hart's lead, for some time ago he made it clear where he believed that at least a teacher's emphasis should be: 'the limited time which the student can spend on jurisprudence is better devoted to analytical inquiries than to sociological jurisprudence'.¹⁰ One reason for this, which Hart rightly says 'no candid student of sociology could deny', is that

valuable as the insights have been which it has provided, the average book written in the sociological vein, whether on legal topics or otherwise, is full of unanalysed concepts and ambiguities of just that sort which a training in analysis might enable a student to confront successfully. Both psychology and sociology are relatively young sciences with an unstable framework of concepts and a correspondingly uncertain and fluctuating terminology. If they are to be used to illuminate us as to the nature of law, these sciences must be handled with care and with a sensitivity to the types of ambiguity and vagueness, and also other linguistic anomalies, which the student will best learn to appreciate in handling the leading concepts of the law in an analytic spirit.¹¹

7 W. L. Twining, 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' 95 *LQ Rev* 561 (1979).

8 *Ibid* 579.

9 See Neil MacCormick, 'Law as Institutional Fact' 90 *LQ Rev* 102, 129 (1974) and MacCormick, 'Challenging Sociological Definitions' 4 *Brit J of L and Soc'y* 94 (1977).

10 H. L. A. Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' 105 *U of Pa L Rev* 972 (1957).

11 *Ibid* 974.

And Hart has on at least one occasion shown us the benefit of such an application of analytic techniques to sociological theory, in his dissection of the views of Lord Devlin and of Durkheim on the sources of social solidarity.¹² Thus analytical inquiries should be distinguished from sociological ones, students should be taught the former and sociologists could, and need to, learn much from conceptual analysts. It is not clear, however, what, if anything, Hart believes analytical jurists have to learn in the conduct of their *own* enterprise, from theoretical or empirical social science.

Ronald Dworkin, Hart's successor at Oxford, has stressed that a 'general theory of law' relies on many branches of philosophy and must 'constantly take up one or another disputed position on problems of philosophy that are not distinctly legal',¹³ but he shows no sign of believing that social theory has much to contribute. When he writes about legal sociology, he, like many lawyers, does not seem to have in mind its theoretical branches, but is thinking of empirical sociological research on legal institutions. Lawyers who attempted such research, he suggests, 'discovered that lawyers do not have the training or statistical equipment necessary to describe complex institutions in other than an introspective and limited way. Sociological jurisprudence therefore became the province of sociologists'.¹⁴ In any event, it is not clear what Dworkin believes sociologists could offer jurisprudence, for he insists that 'jurisprudential issues are at their core issues of moral principle... [I]f jurisprudence is to succeed, it must expose these issues and attack them as issues of moral theory',¹⁵ and Dworkin criticizes 'the sociological approach' among others for obscuring these issues.

Finally, such confident boundary-drawing is epitomized in Joseph Raz's rather impoverished conception of the domain of legal sociology, and perhaps legal philosophy. According to Raz, the difference between legal philosophy, which he does, and legal sociology, which presumably is to be done by someone else, is that 'the latter is concerned with the contingent and with the particular, the former with the necessary and the universal. Sociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess'.¹⁶

My contention in this paper is that such delimitations of what analytical jurists such as Hart *have* been doing, let alone what they should do, are too modest, and that this modesty, while perhaps disarming is not altogether salutary. It obscures some important contributions to a social theoretical

12 H. L. A. Hart, 'Social Solidarity and the Enforcement of Morals' 35 *U of Chicago L Rev* 1-13 (1967).

13 Ronald Dworkin, 'Introduction' in *Taking Rights Seriously* (Duckworth, London 1978) ix.

14 Ronald Dworkin, 'Jurisprudence' op cit 4.

15 *Ibid* 7.

16 Joseph Raz, 'The Institutional Nature of Law' in *The Authority of Law* (Oxford University Press 1979) 105. See also his 'Legal Positivism and the Sources of Law' op cit 42 and 44.

understanding of law which a work such as *The Concept of Law* can make. It also allows some rather central social theoretical assumptions and presuppositions of analytical jurists to receive less attention than they otherwise might. I believe this to be generally true, but because of the stature, importance and breadth of Hart's analysis, I will concentrate my attention here on *The Concept of Law*.

I. 'DESCRIPTIVE SOCIOLOGY'

In the preface to *The Concept of Law*, Hart invites the attention of sociologists, among others, to his work. His aim, he explains,

has been to further the understanding of law, coercion, and morality as different but related social phenomena. Though it is primarily designed for the student of jurisprudence, I hope it may also be of use to those whose chief interests are in moral or political philosophy, or in sociology, rather than in law (p vii).

Moreover, several of the more programmatic statements in the work, such as Hart's commitment to 'the theoretical or scientific study of law as a social phenomenon' (p 205), have a distinctly sociological ring.

But if Hart believes his book will be of *use* to sociologists, this is not because he plans to *do* what they do, and certainly not because he sees himself as involved in explanatory social theory. Rather it is primarily because the conceptual distinctions, refinements and methods with which the book is concerned have sociological bearing and importance. By examining the different ways in which we use words, and the ways in which we use different words, according to the context in which they are appropriate, we stand, Hart believes, to gain much in our understanding both of words *and* context. As he explains in a footnote, there is

great need for a discrimination of the varieties of imperatives by reference to contextual social situations. To ask in what standard sorts of situation would the use of sentences in the grammatical imperative mood be normally classed as 'orders', 'pleas', 'requests', 'commands', 'directions', 'instructions', etc., is a method of discovering not merely facts about language, but the similarities and differences, recognized in language, between various social situations and relationships. The appreciation of these is of great importance for the study of law, morals, and sociology (p 235).

It is in this sense, I believe, that Hart's description of the book as 'an essay in descriptive sociology' is to be understood. Hart rightly insists that his analysis and his *mode* of analysis raise issues of interest to others besides lawyers, philosophers and lexicographers:

Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meanings of words merely throw light on words is false. Many important distinctions, which are not immediately obvious, between types of social situations or relationships may best be

brought to light by an examination of the standard uses of the relevant expressions and of the way in which they depend on a social context, itself often left unstated. In this field of study it is particularly true that we may use, as Professor J. L. Austin said, 'a sharpened awareness of words to sharpen our perception of the phenomena' (p vii).

Hart's claim as to the virtues of what might be called 'linguistic sociology' is true, and, to anyone who reads *The Concept of Law*, obviously true. One merely needs to reflect on the sociological insights which abound in Hart's discussion of the differences between 'being obliged' and 'having an obligation' or between habits and social rules.

More generally, Hart's suggestion that sociologists would do well to pay attention to the conceptual issues with which analytical jurists are concerned, is clearly warranted. It is simply nonsense to suggest that sociology of law can replace, or do without, rigorous, philosophical, conceptual analysis. It must begin with it and return to it continually.¹⁷ I take it that the importance of conceptual issues for a social *theory* of law is obvious, but an adequate conceptual base is scarcely less important for empirical work. Empirical sociologists are often impatient with conceptual debates, but to ignore such matters is not to insulate oneself from the problems with which they are concerned. Not only is there a constant danger of working with muddled and confused concepts, there is also the problem of misdirected research either because one's priorities are set by voguish and often still unexamined concepts or because one works with familiar concepts, often inherited from older conceptual analysts, without realizing their deficiencies. In another context, Lord Keynes nicely characterized this latter problem:

the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.¹⁸

If we replace 'economist' by 'jurist' in this passage, we will better understand how the following complaint could have been made relatively recently:

Most contemporary research on law and society suffers from its unwillingness to even consider a definition of the concept of law and hence the boundaries of investigation. This reluctance is perhaps the most widely shared feature of social scientists interested in law... the dominant Austinian conception of law pervading most of the social sciences is too narrow... My point is merely to emphasize that social scientists have not drawn on a concept of law that adequately addresses forms of law other than commands, a conceptual failure that has led to improperly drawn boundaries of investigation. More importantly, empirical investigations premised upon this initial

17 See further Neil MacCormick, 'Challenging Sociological Definitions' op cit; Neil MacCormick, *H. L. A. Hart*, (Edward Arnold, London 1981) 78 and Philippe Nonet, 'For Jurisprudential Sociology' 10 *L and Soc'y Rev* 525-45 (1976).

18 John Maynard Keynes, *The General Theory of Employment Interest and Money* (Macmillan, London 1936) 383.

failure have led to generalizations about law and society that are of questionable usefulness.¹⁹

The author himself is well aware of Hart's illuminating contribution in this regard, and he draws heavily on Hart's distinctions between 'duty-imposing' and 'power-conferring' laws to make his point. Yet it is astounding that a complaint such as this can appear so long after Hart had made such distinctions central to his refutation of the Austinian 'gunman' concept of law.

Legal anthropologists have long been explicitly concerned with conceptual issues, because their problem is not the one Hart believes generally plagues most of us—"I can recognize an elephant when I see one but I cannot define it" (p 13)—but rather one of deciding whether societies with institutions quite different from the anthropologists' own, or with no differentiated institutions, have anything elephantine at all. However, though their materials raise conceptual issues in an acute form, much anthropological discussion has been marred by even more explicit borrowings, than one finds among sociologists, of outdated and inappropriate juristic definitions of law, with which the institutions of small-scale societies are compared.²⁰ Though this is controversial among legal anthropologists, I doubt that their enterprise would be harmed by a dose of Oxford legal philosophy.

II. THE SOCIAL FUNCTIONS OF LAW

Important as Hart's conceptual analyses are, however, they are not the only forms of sociology in which he indulges. One quickly discovers that he is prepared to use far more than 'a sharpened awareness of words' to enlighten us about phenomena. Unlike Kelsen, it is no part of Hart's ambition to develop a 'pure theory' of law. Indeed, he insists that no adequate account of such an important social institution can be given without reference to social facts, and he repeatedly refers to facts, or alleged facts, about people's behaviour, attitude to rules, resources, and so on. More important, though there are no references in *The Concept of Law*²¹ to the major social theorists who have developed analyses of law and its functions in society, some of the central themes, distinctions and arguments of that work rest on important, if unsystematic and often unsubstantiated, sociological claims.

Thus, Hart lays great emphasis on the 'social functions' which law performs, and he frequently invokes these functions to criticize others', and to support his own, concept of law. At a general level, Hart appears to have no doubt about what law is for. Like many sociologists, he sees it as a means of social control. In an earlier article, replying to Professor Bodenheimer, he suggested that there is 'at

19 Malcolm M. Feeley, 'The Concept of Laws in Social Science: A Critique and Notes on an Expanded View' 10 *L and Soc'y Rev* 503, 508, 509 (1976).

20 I have discussed these issues at greater length in 'Anthropological Approaches' in E. Kamenka and A. E.-S. Tay eds, *Law and Social Control* (Edward Arnold, London 1980) 27-59, esp 28-39.

21 As in much of the work influenced by Hart. See W. L. Twining, op cit 567.

least one aim' which he and Bodenheimer must have in common, 'namely, the increase of our understanding of the character of law as a means of social control'.²² Again, in *The Concept of Law*, Hart objects to views of law that obscure 'the specific character of law as a means of social control' and 'the principal functions of the law as a means of social control' (p 39), and he criticizes 'narrow' concepts of law which would exclude iniquitous laws, on the grounds that

... what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules generally effective in social life. . . the use of the narrower concept here must inevitably split, in a confusing way, our effort to understand both the development and potentialities of the specific method of social control to be seen in a system of primary and secondary rules (pp 204-5).

Given Hart's extraordinary ability to probe and unravel concepts in common use, it is a pity that, like many sociologists, he does not tell us what he means by social control. For it is an extremely murky concept, whether used by sociologists, as it so often is, or by analytical jurists. If ever a concept stood in need of clarification and dissection, this one does: it does not make clear what or who controls or what or who is controlled, and it invites a host of ontological problems when any attempt to clarify it is made. It is in fact a heavily theory-laden concept, which means very different things to Marxists and to functionalists, and would be rejected as a characterization of the function of law by writers such as Fuller.²³ Hart never suggests, however, what theory his use of the concept is laden with. Moreover, to describe law as 'a means of social control' suggests that law has *one* pre-eminent or over-arching function, a claim which is either so general as to be vacuous, or, if made more precise, is likely to be false.

It seems to me no accident, given the ordinary connotations of 'control' in English, that many sociologists who have regarded law as a means of social control have been led to make precisely the mistake that Hart so often warns us against: to regard law primarily as a coercive instrument for the control of deviance. Thus, as one sociologist has recently remarked:

... the basic feature [of social control] is meant to be not the power of a particular social agency or a special social group (though this . . . can be modified), but the normatively guiding influence of the social environment of individuals. As such, social control is an indispensable condition for any human behaviour and sociologists accordingly focused their attention on this phenomenon at a very early stage. It is however remarkable that the emerging outline, after the massive scholarly interest taken by sociologists in the topic of social control in the early and mid-sixties, is that of a coercive mechanism to help keep social *deviance* down and conformism in society up. Deviance is indeed the key-word for sociological research in this field. . . . On the other hand, sociological studies and research

22 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' op cit 953.

23 See Lon L. Fuller, *The Morality of Law* (Yale University Press 1969) 215. See also R. S. Summers, 'Naive Instrumentalism and the Law' in P. M. S. Hacker and J. Raz eds, op cit 123.

very drastically falsified the inadequate picture of law which sociologists had and still have, which many mistake to be the sociology of law: if social control is a check on social deviance, what else can law be than a state check on social deviance, what else can law be than a state check on possible criminal behaviour? Without doubt, the vast majority of the lay public would equate law with criminal law in this way.²⁴

In legal anthropology, too, the loose association of law with control for a long time tended to narrow the dominant conceptions of the role and functions of law and, in particular to focus anthropologists' attention on disputes and dispute settlement at the expense of the many other legally affected domains of social life. Writing in 1951, David Riesman assured us that:

the anthropologist is not likely to harbour the naive assumption that the law, or any other institution, serves only a single function—say, that of social control—and that any other functions which in fact it serves are excrescences or 'contradictions'. The concept of ambivalence is part of his equipment; he tends to search for latent functions, transcending the ostensible.²⁵

In fact, the bulk of work in legal anthropology, as in many other areas of social science, has proceeded on the basis of just this 'naive assumption'. As Laura Nader has pointed out several times,

... the law does not function solely to control. It educates, it punishes, it harasses, it protects private and public interests, it provides entertainment, it serves as a fund-raising institution, it distributes scarce resources, it maintains the status quo, it maintains class systems and cuts across class systems, it integrates and disintegrates—all these things in different places, at different times, with different weightings. It may be a cause of crime; it plays, by virtue of its discretion, the important role of definer of crime. It may encourage respect or disrespect for the law, and so forth. We have assumed that there was probably a cross-cultural difference in the content and form of a legal system, and at the same time we have ignored the variety of functions (sometimes referred to as extralegal, latent, or unintended) that a legal system may or in fact does have.²⁶

It is unfortunate that one of the few concepts which Hart explicitly shares with social scientists is such a vapid one.

However, if all that Hart had to say about the 'social functions' of law was that it is a 'means of social control' one could be pardoned for ignoring this element of his work. For Hart gives the concept virtually no work to do; a reader whose copy of *The Concept of Law* had all references to social control expurgated by some benevolent Bowdler would miss little of the argument of the book. Moreover, though Hart makes no attempt to clarify the concept, and though I believe that it has misled many sociologists and anthropologists, it is less clear that it misleads

24 Klaus A. Ziegert, 'A Sociologist's View' in E. Kamenka and A. E.-S. Tay eds, op cit 63.

25 'Toward an Anthropological Science of Law and the Legal Profession' reprinted in *Individualism Reconsidered* (The Free Press, New York 1954) 445.

26 Laura Nader and Barbara Yngvesson, 'On Studying the Ethnography of Law and its Consequences' in John J. Honigsmann ed, *Handbook of Social and Cultural Anthropology* (Rand McNally, Chicago 1973) 909. See also Martin Krygier, 'Anthropological Approaches' op cit 38-9.

Hart. He is manifestly aware, indeed it is central to his account, that law performs more than one function, and he is very concerned to reject any narrow conception of the law as control which would focus our attention on means of law enforcement or mechanisms of dispute settlement. In this his motivation is explicitly sociological, and he is wiser than many social scientists. In one passage, for example, Hart considers the view that 'by recasting the law in a form of a direction to apply sanctions, an advance in clarity is made, since this form makes plain all that the "bad man" wants to know about the law'. Hart replies:

This may be true but it seems an inadequate defence for the theory. Why should not law be equally if not more concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is? Or with the 'man who wishes to arrange his affairs' if only he can be told how to do it? It is of course very important, if we are to understand the law, to see how the courts administer it when they come to apply its sanctions. But this should not lead us to think that all there is to understand is what happens in courts. The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court (p 39).

This point, that the social functions of law can only be appreciated if one attends to the behaviour of law and to law-affected behaviour outside official institutions, where the bulk of law-affected behaviour occurs, rather than merely inside them, has been made by a number of sociologists of law.²⁷ But legal sociology has too often combined a narrow view of the function of law with an image of law borrowed from lawyers, and focused excessively on what happens in courts or in response to court decisions.²⁸ Similarly legal anthropologists have in the last forty years given the bulk of their attention to what Llewellyn and Hoebel called 'trouble cases'. As a result they have, as I have argued elsewhere,²⁹ constantly run the risk of giving accounts systematically skewed by their reliance on manifest conflict and ways of resolving it rather than on the many other areas of life where Hart rightly suggests law is most characteristically at work. The significance of Hart's observation has also been lost, at times, on his philosophical colleagues. Thus Ronald Dworkin ventures the following extraordinary remark: 'What, in general, is a good reason for decision by a court of law? This is *the* question of jurisprudence; it has been asked in an amazing number of forms, of which the classic "What is law?" is only the briefest'.³⁰ The issue Dworkin identifies is, as his own work shows, of great importance to lawyers and to moral and legal

27 Among them Eugen Ehrlich and Leon Petrażycki. On Ehrlich see Klaus A. Ziegert, 'The Sociology Behind Eugen Ehrlich's Sociology of Law' op cit 242. On Petrażycki, see Adam Podgórecki, *Law and Society* (Routledge and Kegan Paul, London 1974) 67.

28 See Malcolm M. Feeley, op cit 513-16.

29 See 'Anthropological Approaches' op cit 39-50. See also Glynn Cochrane, 'Legal Decisions and Processual Models of Law' 7 *Man* 50-6 (1972).

30 Ronald Dworkin, 'Does Law Have a Function? A Comment on the Two-Level Theory of Decision' 74 *Yale Lj* 640 (1965).

philosophers seeking to give an adequate account of the features of those 'hard cases' which most trouble the best, if not most, lawyers. But Dworkin nowhere shows that this question constitutes 'the issue of jurisprudence' or that the question 'what is law?' can be reduced to it. That he believes this and that he also chooses to base his criticism of Hart's concept of law solely on what judges do in hard cases, suggests he has overlooked the sociological point Hart is making in the above passage, and the importance of it. It is precisely Hart's concern to give greatest emphasis in his account to the socially most significant features of law that distinguishes the centre of gravity of his work from that of Dworkin, and that, in my opinion, makes his work far more important than is commonly acknowledged for social theory and for a sociological understanding of law.

Hart's concern to identify and account for the principal ways in which law affects social life pervades *The Concept of Law*. As is well known, the book develops an exhaustive critique of the Austinian, 'imperativist' definition of law, which occupies three of its chapters. A great deal of Hart's criticism, and much of the weight of his alternative account, rest firmly and explicitly on assertions as to the different social functions performed by two classes of rules: duty-imposing and power-conferring rules. Thus Hart argues that the Austinian analogy between law and orders backed by threats might to some degree fit *criminal* law, for:

The social function which a criminal statute performs is that of setting up and defining certain kinds of conduct as something to be avoided or done by those to whom it applies, irrespective of their wishes. . . . But there are important classes of law where this analogy . . . altogether fails, since they perform a quite different social function (p 27).

Certain theories which seek to save the analogy 'purchase the pleasing uniformity of pattern to which they reduce all laws at too high a price: that of distorting the different social functions which different types of legal rule perform' (p 38). Finally, Hart runs together his observations about social functions with a related but distinct sociological claim (which it is not clear that he realizes *is* distinct) about differences between the way in which the two kinds of rules are *looked upon* by those whom they affect:

Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. . . . Why should rules which are used in this special way, and confer this huge and distinctive amenity, not be recognized as distinct from rules which impose duties, the incidence of which is indeed in part determined by the exercise of such powers? Such power-conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be? (pp 40-41).

Hart's emphasis on the profoundly important role in law of rules which do not forbid, but channel, protect and enforce the public and private exercise of powers

is of great significance for any analysis of the functions of law. But it is precisely at this point that his discussion begins to require more deliberate attention to problems of social theory and to the findings of empirical sociological research than he demonstrates. As we have seen, Hart's argument hinges on his distinction between two types of law, each performing a distinct and apparently readily identifiable social function. But it is no small matter to identify the social functions performed by *any* social institution, let alone law, which permeates so many areas of life and operates in so many different ways. Like all important institutions, law performs many functions, not all of them obvious, and it requires a considerable act of faith to believe that one has identified and distinguished the major functions of all laws, on the basis of the meagre evidence that Hart produces. One problem is that identified by Raz: Hart does not distinguish between what Raz calls the 'normative' functions of law, which 'are ascribed to laws by virtue of their normative nature, their mode of normativity' and its social functions, 'the social effects they have or are intended to have',³¹ and he indiscriminately moves between both. The normative functions of laws can be identified relatively straightforwardly. They 'provide reasons for action... by determining that certain legal consequences follow on the performance of certain actions',³² and one can classify the types of reasons they provide. But, as Raz points out, 'By stating that a reason for action exists a normative remark is made, not a psychological one. Similarly, stating that there is a reason for a certain course of behaviour does not mean that it is a conclusive or overriding reason. Other reasons may be there, some working for the same conclusion and others opposing it. Nothing can be said in general about the rational outcome of such deliberations, let alone their actual conclusion'.³³ There is, then, no reason to believe that the social functions of laws are reducible to their normative ones, nor is it a light undertaking satisfactorily to specify the former. And while Raz's speculations about the social functions of law are both wise and illuminating, he chooses not to argue for, and thus gives us no reason to agree with, his claim that 'all legal systems necessarily perform, at least to a minimal degree, which I am unable to specify, social functions of all the types to be mentioned [in his article], and that these are all the main types of social functions they perform'.³⁴ Nor is it clear how such a claim *could* be substantiated without a great deal of sociological and anthropological research and theory. The passage from Nader quoted above suggests something of the complexity involved in identifying the social functions of law, a complexity which can also be surmised from the following attempt to outline the functions of two social institutions, schools and hospitals, whose functions are considerably more specific than those of law:

31 J. Raz, 'On the Functions of Law' in A. W. B. Simpson ed, *Oxford Essays in Jurisprudence* (Second Series) (Clarendon Press, Oxford 1973) 280.

32 Ibid 282.

33 Ibid 284.

34 Ibid 289. Raz's choice is deliberate. After the sentence I have quoted, Raz continues: 'These claims will not, however, be argued for here. Instead the classification will be simply put forward and explained in general outline'.

What do structures actually do? Schools are established to educate pupils, and they perform that mission with varying degrees of proficiency. They also serve, for younger children, as baby-sitters and day-care centers, as the context for possibly deviant peer-group socialization, as preliminary sorting mechanisms for adult social placement, and possibly as a devious or at least indirect and not very effective device for palliating racial and ethnic discrimination in housing and employment. For younger teenagers, schools keep their pupils off the streets during school hours and serve as 'day reformatories' for juvenile delinquents not committed to official reformatories. For later teenagers and young adults the adult placement function becomes more precise; meanwhile staying in school delays entrance into the competitive and possibly overcrowded labor force, and in that sense at least represents a prolongation of infancy.

Hospitals provide another convenient example of multifunctionality. While at least nominally providing medical therapy for the sick or wounded, they must necessarily also provide custodial and hotel-and-restaurant services. They get the sick or dying persons out of the household and, especially for the moribund, provide a kind of emotionally sterile setting for death. Concentration of medical services in a separate establishment eases the problems of coordinating specialized services and has the more than incidental consequence of requiring the patient to get to the services rather than the physician or visiting nurse delivering the services to the patient's home . . .

Like the various examples of the utility of derogated practices such as magic or corrupt urban government, the unadvertised and often unintended consequences of organized behavior go well beyond common sense or the unreflective experience of participants and lay observers.³⁵

It is, then, a major task simply to identify the functions performed by law, particularly since similar institutions can perform different functions in different societies, and in the same societies at different times, and in developed Western societies law is continually called upon to perform new functions. It is another major task of social theory to analyse these purported functions and decide which are 'major' or 'universal'. Neither of these tasks can be satisfactorily performed simply on the basis of a lawyer's acquaintance, however sophisticated, with the normative functions of law. Nor can they be performed by calling in aid, as Hart does, the ways in which rules are 'thought of, spoken of and used in social life'. This is because, to use old-fashioned functionalist terminology, law, like any institution, performs at least both 'manifest' and 'latent' functions and the latter are not easily detectable on the basis of the sort of evidence Hart adduces. Few people who marry, for example, know (or care) much about the social functions of the institution whose rules they enlist. However, even if the evidence Hart relies upon were appropriate to his purposes, we run up against the fact, pointed out by MacCormick, that the truth of Hart's conclusions about the functions of rules 'depends upon a testable but untested sociological assertion. The truth is that we do not know nearly enough about the way in which people in general perceive, or the extent to which they understand, the law, to rest any theoretical account of the

35 Wilbert E. Moore, 'Functionalism' in Tom Bottomore and Robert Nisbet eds, *A History of Sociological Analysis* (Heinemann, London 1979) 339-40.

structure of the law upon such grounds'.³⁶ What we have from Hart are hypotheses serving the role of factual premises in an argument. As hypotheses they are fruitful, if only because Hart's guesses are likely to be more interesting than most. They cannot, however, bear the weight he seeks to load onto them.

III. INTERNAL AND EXTERNAL ATTITUDES TO LAW

Hart does not merely invoke people's attitudes to law in order to indicate its social functions. Throughout *The Concept of Law*, he lays great stress on the importance of understanding the attitudes to laws of those who are affected by them and use them. Hart's discussion is confused, however, and has confused others; so it must be unravelled. According to Hart, 'one of the central themes of the book is that neither law nor any other form of social structure can be understood without an appreciation of certain crucial distinctions between two different kinds of statement, which I have called "internal" and "external" and which can both be made whenever social rules are observed' (p vii). Later he claims that until the distinction is grasped between an 'external' predictive account of law, and his own account, which allows for the internal aspect of rules, 'we cannot properly understand the whole distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society' (p 86). Unfortunately, Hart's spatial metaphor is used in a number of different ways which he does not differentiate, but which for our purposes it is important to distinguish.³⁷ Hart first uses the metaphor to distinguish between habits and social rules:

When a habit is general in a social group, this generality is merely a fact about the observable behaviour of most of the group. . . . By contrast, if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record (p 55).

Hart uses the same metaphor to make a second and different distinction, within a social group where one or more social rules exist, between those who voluntarily accept and use the rules, and those who reject them and only follow them to avoid punishment:

At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to

³⁶ Neil MacCormick, 'Law as Institutional Fact' op cit 116.

³⁷ Distinctions similar to the ones made here can be found in Frederick Siegler, 'Hart on Rules of Obligation' 45 *Australasian J of Phil* 350 ff (1967), and, following Siegler's analysis, John D. Hodson, 'Hart on the Internal Aspect of Rules' 62 *Archiv für Rechts-und Sozialphilosophie* 381-99 (1976).

them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence (p 88).

Hart adds the cautionary final sentence quoted, because he is concerned to refute the predictive view of obligation which defines it 'in terms of the likelihood that threatened punishment or hostile reaction will follow deviation from certain lines of conduct' (p 86). That account pays no attention to the 'internal' attitude of voluntary rule-followers. Observers are led to such an account by their faulty methodological position, a position which Hart discusses again in terms of the internal/external distinction. He distinguishes three different 'points of view' from which one can make assertions about the rule-affected behaviour of members of a group. If one is 'a member of a group which accepts and uses them [its rules] as guides to conduct' (p 86), one makes assertions from an 'internal point of view'. In fact, to be consistent with the previous 'internal/external' distinction and with other passages in the book, this phrase will need to be limited: only a member of such a group who *himself* accepts and uses the rules can be said to have the internal point of view.

If one is an observer who does not accept the rules oneself, but acknowledges that the group does, one 'thus may from outside refer to the way in which *they* are concerned with them from the internal point of view' (p 87). Hart calls such a point of view an 'external' one, but he has little to say about it and nothing to say against it. This is fortunate since if *such* a point of view were illegitimate, all anthropology and most social science generally would also be illegitimate. We may call this a moderate external point of view to contrast it with what Hart calls the 'extreme external point of view' held by those who neither accept the rules nor give 'any account of the manner in which members of the group who accept the rules view their own regular behaviour' (p 87). Such an observer cannot describe the life of a group 'in terms of rules at all. . . . Instead, it will be in terms of observable regularities of conduct, predictions, probabilities, and signs. For such an observer, deviations by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow, and nothing more' (p 87). It is *this* sort of observer who, Hart believes, will 'miss out a whole dimension of the social life of those whom he is watching' (p 87), for

The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation. . . . What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz, in all the familiar transactions of

life according to rules. For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility (p 88).

For anyone interested in examining social behaviour, the points Hart makes in these passages are of obvious and great importance. So, however, are the differences between them, which Hart obscures. In particular, while Hart has much the same thing in mind when he discusses the, for him more interesting 'internal' point of view, he obscures the differences which exist between 'external' points of view. The 'external aspect' of a habit is simply 'regular uniform behaviour' which lacks not only the 'internal aspect' but also any of the compulsion which drives someone to comply with a rule even though he rejects it. In other words, the external aspect of habits has as much and as little in common with the external aspect of rules as it has with their internal aspect, viz regular performance. 'External' rule-affected behaviour is still rule-affected; 'external' habitual behaviour is not. Even if you do not accept the rule, in following it you *obey* it, if only from fear of coercion. But you do not *obey* your habits. And the attitude of a criminal who 'reject[s] the rules and attend[s] to them only from the external point of view as a sign of possible punishment', has nothing at all in common with the attitude of someone with a habit; as we know many people are quite attached to their habits. When Hart contrasts rules with habits he is making a distinction similar to that which Durkheim made between custom and habit: 'Ce qui la distingue, ce n'est pas sa fréquence plus ou moins grande; c'est sa vertu impérative. Elle ne représente pas simplement ce qui se fait le plus souvent, mais ce qui doit se faire'.³⁸ On the other hand, Hart's second distinction is similar to, perhaps it influenced, that made by a Polish empirical sociologist of law, between 'outer' and 'inner' attitudes to law:

An outer-oriented individual obeys the law as a result of consideration of what might happen if he deviated from a legal norm. On the other hand, we say that a law-abiding individual is inner-oriented if he accepts a given norm as his own, as well as knowing that he will meet disapproval if he behaves unlawfully; deviant behaviour is for him not only grounds to expect some consequence or other but a sufficient reason or justification for such consequences.³⁹

Both these distinctions—that between habits and rules and that between acceptance of and mere obedience of rules—need to be made, but little of use for social theory, or conceptual analysis, is gained by confusing them.

Moreover, apart from eliding what is 'external' about habits and a certain way of obeying rules, Hart also confuses *substantive* questions about the attitudes that might be expected from group-members with an 'external' interest in rules (such as criminals or, for that matter, act utilitarians), and

38 Emile Durkheim, 'Introduction à la sociologie de la famille' *Textes* vol 3 (Editions de Minuit, Paris 1975, first published 1888) 19.

39 J. Kwaśniewski, 'Z badań nad motywacją przestrzegania prawa' in *Prawnicy, socjologowie i psychologowie* (Warsaw 1970) quoted in Adam Podgórecki, op cit 28.

methodological questions about the proper point of view for an observer to adopt. Whether observers should merely record observable behaviour, seek via 'empathy' or '*Verstehen*' to understand its meaning to group-members, or 'go native' are not new issues in the social sciences, or, for readers of Weber, in the sociology of law. The issues are not simple, but I agree with Hart (and Weber) that to ignore the *meanings* of rule-affected behaviour to those involved is to 'miss out a whole dimension of social life'. Hart's arguments are a valuable hermeneutic corrective to a great deal of 'positivist' sociology.⁴⁰ But this methodological issue must be distinguished from the substantive one of what attitudes members of a society take to their rules. Because Hart does confuse these two issues, he claims that '[t]he external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules...'. This is to ignore the complexity of attitudes usually involved in rejecting or not accepting a rule and indeed it is to sell short the importance of the hermeneutic method that Hart endorses. For a behaviourist observer will fail to understand the rule-affected behaviour, not merely of those who accept the rules but also of those who reject them or have some mixture of attitudes toward them. He will simply not be able to know what their behaviour means, though he might, nevertheless, be able to predict it.

IV. PRE-LEGAL AND LEGAL SYSTEMS

The different uses Hart makes of the internal/external metaphor do not all play the same role in his theory. In particular, the second use of it, to distinguish between those *members* of a society who manifest different attitudes to its rules, is central not only to Hart's account of fully developed legal systems but also to his discussion of the differences between 'pre-legal' and legal systems. This discussion mixes conceptual analysis, 'state of nature' thought experiments, and, of particular importance for our purposes, forays, sometimes deliberate sometimes inadvertent, into explanatory social theory.

Hart asks us to consider how society, and in particular 'social control', would be managed if our familiar legal institutions—in Malinowski's phrase 'central authority, codes, courts, and constables'—were absent. Though he believes, wrongly, that 'few societies have existed in which legislative and adjudicative organs were all entirely lacking' (p 244), he concedes that such a society is

⁴⁰ According to Donald Black, 'It is crucial to be clear that from a sociological standpoint, law consists in observable acts, not in rules as the concept of rule or norm is employed in the literature of jurisprudence and in everyday legal language. From a sociological point of view, law is not what lawyers regard as binding or obligatory precepts, but rather, for example, the observable dispositions of judges, policemen, prosecutors, or administrative officials'. See his 'The Boundaries of Legal Sociology' in Donald Black and Maureen Mileski eds, *The Social Organisation of Law* (Seminar Press, New York) 41, 46 and the critique of his position, drawing partly on Hart, by Philippe Nonet, 'For Jurisprudential Sociology' *op cit*.

'possible to imagine' (p 89) and that many anthropologists 'claim that this possibility is realized' (p 89). Whether or not they exist, however, Hart, like the social contract theorists, considers it useful to think away familiar institutions, for by conceiving life without them, we might gain insight into their purposes and functions. In such a society, Hart believes, 'the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation' (p 89), that is, primary rules. That sort of social control, moreover, could only be effective in stable, small-scale societies, for:

It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a régime of unofficial rules. In any other conditions such a simple form of social control must prove defective and will require supplementation in different ways (pp 89-90).

The specific problems a society with only primary rules would face are the uncertainty of its rules, their static character, and 'the *inefficiency* of the diffuse social pressure by which the rules are maintained. Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation' (p 91). The remedies for these defects are *secondary* rules of recognition, change and adjudication; rules about rules. The addition of such rules 'is a step forward as important to society as the invention of the wheel' (p 41); only with them do we have what can correctly be called a legal system:

The introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies together are enough to convert the régime of primary rules into what is indisputably a legal system (p 91).

According to Hart, once secondary rules of these three kinds are added to the primary ones, not only does law exist, but members of a society can manifest a more complex range of attitudes to their rules than was possible in the simple, pre-legal world. For one of the conditions for a society 'to live by primary rules alone', 'granted a few of the most obvious truisms about human nature and the world we live in' (p 89) is that most of the members of the society must have the *internal* attitude to its rules since:

though such a society may exhibit the tension, already described, between those who accept the rules and those who reject the rules except where fear of social pressure induces them to conform, it is plain that the latter cannot be more than a minority, if so loosely organized a society of persons, approximately equal in physical strength, is to endure: for otherwise those who reject the rules would have too little social pressure to fear. This too is confirmed by what we know of primitive communities where, though there are dissidents and malefactors, the majority live by the rules seen from the internal point of view (p 89).

In this passage, as his appeal to 'what we know' about primitive societies indicates, Hart is seeking to explain the *empirically* necessary conditions for an undifferentiated society to endure. He also makes the conceptual point that in

a simpler decentralized pre-legal form of social structure which consists only of primary rules . . . since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules (pp 113-4).

In complex societies which have law and officials, however, there is no necessity, either logical or factual, for ordinary members of a society to take an internal attitude to the law, though in a 'healthy' society they commonly will. In such a society, private citizens need only generally *obey* the law. Officials, on the other hand, must have the internal attitude to the secondary rules of the legal system, in particular to its criteria of validity; 'they must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses' (p 113). These are the two conditions necessary and sufficient for the existence of a legal system: the law must be generally obeyed, and officials must have the 'internal attitude' to the secondary rules.

There is much of sociological value in this hypothetical evolutionary theory. As Colvin has demonstrated,⁴¹ it can be used to shed light on a range of important issues in the sociology of law; among them the sources of legal development, its relationship to social complexity and change, the role and importance of a division of legal labour. Again, in his excellent study *Law without Precedent*, the anthropologist Lloyd Fallers adopted Hart's view of law as a combination of primary and secondary rules, in order to make useful distinctions between societies, including our own and the Basoga of Uganda which do, and those which do not, make use of 'the legal mode of social control'. In this usage the legal mode 'requires that values with respect to human conduct be reduced to normative statements which are sufficiently discrete and clear so that it may be authoritatively determined *whether or not* in a particular case a particular rule has been violated'.⁴² Fallers contrasts this 'way of looking at social conflict—in terms of violation of rule' with two other ways: regarding and dealing with such conflicts simply as conflicts of *interest*, as political, or military conflicts might be regarded; and 'full moral evaluation' where 'community standards may exist, but an attempt is made to take account of the full moral complexity of conflict situations'.⁴³ Like Hart, Fallers believes that 'law' properly so called requires secondary rules.

Nonetheless, Hart's discussion is not without difficulties. On his account, the major differences between pre-legal and legal systems are that the former have primary rules alone whereas the latter have both primary and secondary rules; the only means of control in the former are 'the general attitude of the group' to its primary rules whereas the latter have laws and legal institutions; in the former,

⁴¹ Op cit, *supra* n 3.

⁴² Chicago University Press 1969, 11.

⁴³ Ibid 11-12.

most people have and must have the 'internal' attitude to the society's primary rules whereas in the latter only officials need to have the internal attitude to the secondary rules of the legal system.

In all of this, the central concept is that of a rule. For a theorist concerned to understand law and rules as means of social control, Hart is surprisingly uncurious about alternatives to law or rules. Were he more curious, he might rely less on contrasts such as those outlined above. It is a real anthropological and ultimately philosophical problem whether the understandings of members of many small-scale societies should be described as rule-following behaviour. Often anthropologists have difficulty in *finding* rules at all, for, as Llewellyn and Hoebel point out,

if one takes as his main road . . . the road of felt or known 'norms', he meets in some cultures with bafflement on the part of the informant. A Comanche, or a Barama River Carib, does not like to think that way. He finds trouble in reducing such general 'norms' to expression or in stating a solution for an abstract or a hypothetical case.⁴⁴

Conversely, in societies where general norms *can* be gleaned from informants, it can be misleading to interpret them as the norms which guide social life. This is not merely because one might be misinformed, or because one is hearing an idealized story. It is because, though the rules one gleans might really be endorsed by members of a society, these rules may not play the normative function in that society which outsiders expect. Thus it was common, after the pioneering work of Fortes and Evans-Pritchard,⁴⁵ to interpret the segmentary lineage systems of many African stateless societies as the basis for dispute resolution in such societies. As E. L. Peters has demonstrated, however,

When a Bedouin kills another in Cyrenaica, one of a number of consequences ensues. According to the Bedouin, the particular consequence is determined by the genealogical positions of the persons or groups concerned . . . [in fact] the lineage model neither covers several important areas of social relationships nor enables an accurate prediction of events to be made. . . . The argument advanced [by Peters] is that the lineage model is not a sociological one, but that it is a frame of reference used by a particular people to give them a common-sense kind of understanding of their social relationships. For sociological purposes this means that the lineage model, with its supporting theoretical presuppositions, must perforce be abandoned.⁴⁶

These anthropological problems may not seem important for Hart, for people could still be said to be following rules without knowing it, or following rules other than the ones they say they follow. This is true, though it is difficult to see how people can have the 'internal' attitude to rules of which they are apparently unaware, and we should remember that Hart does consider important the way

44 *The Cheyenne Way* (University of Oklahoma Press) 22.

45 M. Fortes and E. E. Evans-Pritchard eds, *African Political Systems* (Oxford University Press 1940).

46 E. L. Peters, 'Some Structural Aspects of the Feud Among the Camel-herding Bedouin of Cyrenaica' 37 *Africa* 261 (1967).

that rules are 'thought of, spoken of, and used in social life'. In any event there are deeper problems with Hart's 'model of rules'. For in many undifferentiated societies, whose social structure is, as Hart notes, small in scale and closely-knit, rules do not play the same role and do not operate in the same way as they do among lawyers, and many of their clients, in differentiated societies. In small-scale societies, where one is in the constant company, and under the constant surveillance of one's peers, and the community has numerous cross-cutting and interdependent ties, there are many ways of knowing, and being reminded, what is expected, other than by a reliance on rules. And in such societies, as among contemporary families, friends and small communities, the *stakes* of social relationships are quite different from those of a contemporary litigant. As one of the foremost students of stateless societies has written (of the Tonga-speakers of Zambia),

The Tonga in particular have taught me something about what it means to live without the formal apparatus of courts, police, or public officials. Some of the devices they used, and still attempt to use, for organizing and regulating their affairs are recognizable as common to other small-scale communities that must depend upon persuasion and stalling tactics for social control. Indeed, some of these devices are not unknown to the academic world and the world of committees with which I sometimes deal, if survival and continuity come to be more important than individual interests or adherence to abstract principles.⁴⁷

Though societies appear to differ greatly in the use they make of explicit norms, none of this is meant to suggest that small-scale societies have no norms. It is to suggest, however, that Hart's speculations about 'pre-legal' societies are excessively 'rule-bound'. Norms in small-scale societies, even where they are discernible and effective, are rarely clear-cut, almost never apply impersonally or across the board, and often cannot even in principle be stated in abstract terms. For the way in which a dispute over, say, theft or assault is handled will vary greatly with the status and general reputation of the specific parties involved, the relationships between them, between them and potential allies and opponents, between these potential allies and opponents themselves. Nor will these relationships necessarily *determine* the outcome of 'legal' disputes; they will, however, profoundly influence them and what is done about them.

These points serve to give specific confirmation to one of the major themes in MacCormick's recent work on Hart:

Despite its claimed and indeed its genuine superiority over prior theories, Hart's theory can itself be shown to be defective. First, it ties the relevant concepts solely to *rules*; but . . . 'rule' is too restrictive a category to comprehend all that needs to be said about moral values, standards and principles; nor is there better reason to suppose that law is an affair of rules *only*.⁴⁸

It is significant that MacCormick's point has force not only with regard to

47 E. Colson, *Tradition and Contract: The Problem of Order* (Aldine, Chicago 1974) 3-4.

48 H. L. A. Hart, 58. See also 41-2, and with specific reference to Hart's discussion of 'pre-legal' systems, 100-01.

'pre-legal' systems, but to 'legal' ones as well. For, though they are important, the differences between the way in which rules operate in differentiated societies and other forms of 'social control' in undifferentiated ones should not be overemphasized. Indeed contrasts such as Hart's, between 'pre-legal' and 'legal' systems can rarely be made with accuracy or more than notional precision. They also often involve false comparisons, where similarities between different societies are overlooked, and peculiarities of each are emphasized. However, given that the differences between the institutions, structures, and ways of life of small-scale and highly differentiated societies are so considerable, it would be surprising if the only important differences between their 'means of social control' were that the former had one type of rule of which there was general acceptance, and the latter had two types, and officials had to accept the second. However, this is all that Hart allows for. Since he does not conceive of social cohesion without rules, and since he believes that the only alternative to secondary rules is 'the general attitude of the group', he is led to contend that the majority in small-scale societies must have an internal attitude to their rules. But many small-scale, stateless societies do not conform to this account. Cohesion in these societies is not maintained by general rules which all accept, but by complicated balancing and cross-cutting group ties. Colson revealed the principles underlying order in such a society in her pioneering study on the Plateau Tonga of Northern Rhodesia, and the system she revealed has since been found in many other stateless societies, particularly in New Guinea. According to Colson,

Tonga society, despite its lack of political organization and political unity, is a well-integrated entity, knit together by the spread of kinship ties from locality to locality, and the intertwining of kinship ties within any one locality. It obtains its integration and its power to control its members and the different groups in which they are aligned, by the integration of each individual into a number of different systems of relationships which overlap. When a man seeks to act in terms of his obligation to one set of relationships, he is faced by the counter-claims upon him of other groups with which he must also interact. This entanglement of claims leads to attempts to seek an equitable settlement in the interests of the public peace which alone enables the groups to perform their obligations one to another and a Tonga to live as a full member of his society.⁴⁹

49 E. Colson, 'Social Control and Vengeance in Plateau Tonga Society' 23 *Africa*, 210 (1953). Galloway has made a similar criticism of Hart, drawing on Barnes' account of Colson's findings. He cites an apposite passage from Barnes: 'In Tonga society, order was maintained, more or less, neither through the operation of centralized authority mediated through a system of courts, nor through the operation of pressure to conform imposed by a homogeneous and undifferentiated community. Order was achieved through the potential opposition of each group to all other groups, so that no one group dominated the rest, and, more importantly, by the fact that every individual had a plurality of loyalties'. J. A. Barnes, 'Law as Politically Active' in G. Sawyer ed, *Studies in the Sociology of Law* (ANU, Canberra 1961) 175, quoted in Donald C. Galloway, 'The Axiology of Analytical Jurisprudence: A Study of the Underlying Sociological Assumptions and Ideological Presuppositions' in Thomas W. Bechtler ed, *Law in a Social Context. Liber Amicorum Honouring Lon L. Fuller* (Kluwer, The Netherlands 1977) 85-86.

For such a society, an explanation of social cohesion in terms of a generalized 'internal' attitude to 'rules' is inappropriate and misleading. It over-emphasizes rules, under-emphasizes the considerable amount of conflict in small-scale societies, and ignores the powerful role of what Hart would associate with an external attitude—simple fear—in the endurance of small societies. In such societies, without rules to limit the power of the powerful, the 'fear of violence that brings more violence'⁵⁰ plays an important role in preventing, or damping down, disputes. As Colson remarks,

Anthropologists have a liking for paradoxes and it should therefore be no surprise to us if some people live in what appears to be a Rousseauian paradise because they take a Hobbesian view of their situation: they walk softly because they believe it necessary not to offend others whom they regard as dangerous.⁵¹

One reason for this situation is the absence of institutions with authority to adjudicate and power to enforce judgments. Though he has little to say about enforcement, Hart is therefore right in emphasizing the importance to a legal system of public secondary rules. But his speculations about what would occur without such rules—a society glued together by a generalized internal attitude to primary rules—are not very helpful either in understanding control in small societies or in the societies with which they are contrasted.

Moreover, even in regard to fully developed legal systems, Hart's emphasis on the need for officials to 'accept' the system's secondary rules is ambiguous and potentially misleading. Hart appears to believe that there is a specially close link between *voluntariness* and the official acceptance which is necessary for a legal system to exist, a link which does not necessarily exist between voluntariness and mere obedience. Obedience, which is all that is required from non-officials for a legal system to exist 'need involve no thought on the part of the person obeying that what he does is the right thing for himself and for others to do: he need have no view of what he does as a fulfilment of a standard of behaviour for others of the social group. He need not think of his conforming behaviour as "right", "correct", or "obligatory". . . . But this merely personal concern with the rules, which is all the ordinary citizen *may* have in obeying them, cannot characterize the attitude of the courts to the rules with which they operate as courts. . . . Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is . . . logically a necessary condition of our ability to speak of the existence of a single legal system' (pp 112–13). Now it does appear to be a conceptual truth that unless a system's valid rules were generally obeyed we would not say that a legal system exists, and perhaps like deciding when a man is bald, one cannot ask for more precision than that. It also appears necessarily true for the existence of a legal system, in Hart's sense, that its officials at least must recognize the secondary rules of the system *as rules* and

⁵⁰ E. Colson, *Tradition and Contract* 40.

⁵¹ *Ibid* 37.

regard the rules as applicable to the behaviour of other officials. But, as Hodson,⁵² from whom I have drawn these two conditions, has argued, Hart believes that acceptance on the part of officials includes far more than that. In particular, towards the end of the book, Hart recapitulates his argument. He recalls that

In the earlier chapters of this book we stressed the fact that the existence of a legal system is a social phenomenon which *always* presents two aspects, to both of which we must attend if our view of it is to be realistic. It involves the attitudes and behaviour involved in the *voluntary* acceptance of rules and also the *simpler* attitudes and behaviour involved in mere obedience or acquiescence (p 197, my italics).

I see no reason to believe, however, that official 'acceptance' of rules need be any more 'voluntary' than masses' 'mere obedience'. Certainly, it is *possible* to imagine a society in which those who accepted and applied the rules *as rules*, did so purely out of fear. And in fact Stalin's *Ezhovshchina* was full, and frequently emptied, of bureaucrats to whom such a description appears more plausible than talk of voluntary acceptance. Paradoxically, much *popular* behaviour appeared much more voluntary than that of officials. But if Hart is making a point of social or political theory, about the need for legitimacy of every régime, or the need that someone should internalize its norms, then his analysis does not take us very far. For it is an interesting and complex question of theory and research *who* in a society needs to regard it and its rules as legitimate, how much, and for how long. The Shah of Iran could certainly have used some enlightenment in this regard. Analysis which considers 'mere obedience or acquiescence' as simple attitudes, or suggests that there is a necessary connection between voluntariness and the analytically central constituents of official legal behaviour, would not have helped him.

V. THE MINIMUM CONTENT OF NATURAL LAW

A similar insouciance about what is required to substantiate a statement of social theory pervades Hart's final and most explicit venture into this field; his account of what he calls 'the minimum content of natural law'. This is Hart's solution to 'the hoary perennial known as "Natural Law versus Legal Positivism"'.⁵³ By means of it, he seeks to avoid both the Scylla of an absolute distinction between law and morals and the Charybdis of traditional natural law theories. Hart derives the 'minimum content', or the 'empirical version' of natural law from the combination of 'a mere contingent fact which could be otherwise, that in general men do desire to live... survival has a special status in relation to human conduct and to our thought about it' (p 188), with five general characteristics of the human condition. These are that humans are physically vulnerable, approximately equal, and have only limited altruism, scarce resources, and limited understanding and strength of will. From these contingent but universal 'natural facts', Hart argues,

⁵² Op cit 392 ff.

⁵³ H. L. A. Hart, 'Kelsen Visited' 10 *UCLA L Rev* 709 (1963).

we can derive 'a *reason* why, given survival as an aim, law and morals should include a specific content' (p 189), a reason for certain mutual forbearances, for example, on random killing, as well as for rules relating to promises that are '*dynamic* in the sense that they enable individuals to create obligations and to vary their incidence' (p 192) and for a system of organized sanctions, 'not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not' (p 193). It is *this* which is the solution to the 'hoary perennial':

The simple truisms we have discussed not only disclose the core of good sense in the doctrine of Natural Law. They are of vital importance for the understanding of law and morals, and they explain why the definition of the basic forms of these in purely formal terms, without reference to any specific content or social needs, has proved so inadequate. . . It is in this form that we should reply to the positivist thesis that 'law may have any content'. For it is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved besides definitions and ordinary statements of fact, for a third category of statements: those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have (pp 194-95).

No social scientist could disagree with the last sentence of this passage. However, since so much of Hart's account of the 'minimum content' hangs on statements in this third category, one might want to know their source. Typically, it is Hobbes and Hume rather than, say, Durkheim or the theories and findings of sociologists or anthropologists. This is a rather cavalier way to found 'the central indisputable element which gives empirical good sense to the terminology of Natural Law' (p 187). For when Hume gave his account of the origins of society and morals, he was, after all, something of a pioneer in what Hart has elsewhere referred to as the 'relatively young sciences' of psychology and sociology. Hume was, as Mackie has recently reminded us, attempting to explain the existence of morality 'in sociological and psychological terms . . . It is not for nothing that his work is entitled *A Treatise of Human Nature* and sub-titled *An attempt to introduce the experimental method of reasoning into moral subjects*'.⁵⁴ Hart's attempt to continue Hume's *enterprise* is important and valuable; what is wrong is that he rests with Hume as the source of his *data*. One might, for example, discover that men *universally* have goals and purposes other than survival, which would lead us at least to augment Hart's account. Hobbes after all, spoke of a desire, not merely to live but for 'commodious living'. Freud mentioned other concerns, and other apparently universal purposes could be suggested. Moreover, men may universally have goals and purposes which are incorporated generally into morality and law but which are inconsistent with individual survival. Conscript laws exist in many societies and are used for wars which often cannot be said to threaten the survival of a State, let alone its non-combatant population. They frequently, however, lead to the demise of individual

54 J. L. Mackie, *Hume's Moral Theory* (Routledge and Kegan Paul, London 1980) 6.

combatants. And in those (relatively few) societies which allow conscientious objection, an individual's fervent wish to survive is never taken to be adequate reason, either in morals or law, for exemption. One might, then, share Hart's aim, to derive the 'core of good sense' in natural law doctrine, without being persuaded that he has revealed it.

Furthermore, quite apart from the fact that Hart has chosen to rest with 'truisms' about the human condition, these are truisms of a specifically individualist, pre-sociological kind. Hart's 'natural facts' refer to the needs and characteristics of individuals and the nature of their environment, but, apart from relating the division of labour, found 'in all but the smallest groups', to power-conferring rules and 'the perennial need for co-operation' to rules about promises, he has nothing to say about other 'social facts' which might be relevant to his account. One does not need to indulge in Hegelian metaphysics to suggest that the forms of social organization in which individuals find themselves cannot simply be jettisoned or ignored either by their members or by observers. In this sense, one must account for what is required for *societies* to survive, and though Hart considers such issues elsewhere, he hardly does so in this context. Certainly, there are elements common to law and morality in all societies, such as incest taboos, rules regarding kinship, marriage and descent, the existence of which needs to be explained. A methodological individualist might explain such phenomena in terms of universal individual purposes other than survival; a functionalist sociologist might identify 'social functions' which are regularly performed in all societies, and which are necessary if certain forms of social organization are to persist despite the passing of individuals. In either case, the minimum content of natural law is unlikely to survive unscathed.

VI. CONCLUSION

Like members of craft unions, academics are rather fond of erecting and maintaining disciplinary boundaries. Such boundaries, of course, have legitimate purposes, particularly pedagogic ones, and as indications of special skills, approaches and areas of interest. Certainly, for example, there is a great deal of legal philosophy which does not raise issues of social theory, and much legal sociology which is of little interest to legal philosophers, among others. But not all such boundaries are worth preserving, and even those that are should allow free passage where appropriate. Sometimes, precisely because one has only a sketchy idea of what is happening on the other side of the fence, one caricatures it, the more easily to distinguish between what can be done over there and in one's own field. This appears to me to have happened in some of the contrasts between the domains of legal philosophy and sociology, which I quoted earlier. More generally, even where boundaries are accurately drawn, there are times, as I have sought to suggest here, when it might be fruitful, even necessary, to ignore them, or at least cross them deliberately and often.

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¹² **Social Solidarity and the Enforcement of Morality**

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²⁹ **Legal Decisions and Processual Models of Law**

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