

Chapter One

law is one about a scheme of interpretation; it is a question about the collective meaning and self-understandings of a complex social reality. A scientific interest about ways in which judges reach their decisions, psychologically, sociologically, or otherwise, is a worthwhile project. But it is just not the kind of project that could possibly explain what constitutes a judicial role in the legal sense of it, or what constitutes a legal norm as opposed to other types of sources that may or may not affect judges' decisions.

SUGGESTED FURTHER READINGS

George, *Natural Law Theory*.

Hart, *Essays on Jurisprudence*, chap. 4.

Kelsen, *General Theory of Law and State*.

———, *Pure Theory of Law*.

Llewellyn, *Jurisprudence: Realism in Theory and Practice*.

Raz, *The Authority of Law*, chaps. 3–8, 16.

———, *The Concept of a Legal System*.

CHAPTER TWO

Social Rules at the Foundations of Law

KELSEN'S INFLUENCE on H.L.A. Hart's seminal work in legal philosophy, *The Concept of Law*, might not be readily apparent to a casual reader. A substantial part of the book is devoted to a detailed criticism of John Austin's command theory of law, while Kelsen's work is hardly mentioned. In this chapter I want to show that Hart's theory of law takes Kelsen's foundation to its reasonable conclusions, relying on some of Kelsen's best insights but amending them in some crucial aspects. In particular, Kelsen's failure to provide a nonreductive explanation of legal validity is a lesson that Hart carefully learned. His theory of law is reductive all the way through. The reductive explanation that Hart offered is not confined to the explication of legal validity; it extends to a quasi-sociological account of the normativity of law as well. Hart's extensive critical focus on Austin creates the impression that he found Austin's reductive definition of law profoundly inadequate. That is true, but Hart's main argument with Austin is not about reductionism per se; it aims to show that the particular reduction that Austin offered uses the wrong building blocks. Instead of trying to reduce law to a sociological conception of sovereignty, as Austin suggested, Hart offers a more nuanced and complex picture that puts the idea of social rules at the foundations of law.

The chapter proceeds as follows: In the first part I will briefly present Hart's critique of Austin's theory of law, focusing on two main themes—that law is not comprised of commands, and that law does not necessarily emanate from the political sovereign. In the second part I will show that Hart's alternative to Austin is a reductive version of Kelsen's theory of the basic norm. Finally, I will point out some of the difficulties in Hart's account of the

normativity of law, suggesting some avenues that will be pursued in subsequent chapters.

WHY LAW IS NOT THE COMMAND OF THE SOVEREIGN

Commands

A long tradition in jurisprudence, dating back to the political philosophy of Thomas Hobbes, sees the law as the tool of political sovereignty. Law is the means by which the political sovereign rules and directs the conduct of its subjects. It is all too easy to dismiss this conception as anachronistic. Does it not assume that the political sovereign is like an absolute monarch, sitting on his throne issuing commands to his subjects to do this or refrain from doing that? Surely a modern legal system is more complex than that, and it is doubtful that law has ever been quite so simple. Let us not be so dismissive. The command theory of law is based on two powerful insights. First, it assumes, quite plausibly, that laws consist of instructions or directives issued by some people in order to direct the conduct of others. Now, of course, there are many contexts in which some people tell other people what to do or how to behave. What makes action-guiding instructions legal has to do with the origins and the function of the guidance: If the guidance emanates from the political sovereign and purports to function as an exercise of sovereignty, then it is law. Recall our first example about the use of mobile phones while driving: What makes it the law in California these days that one has to use a hands-free device? Surely, as we have seen, it is not the content of the directive. What makes it a legal norm is the fact that the requirement has been issued, in the appropriate way, by the California legislature in its legislative capacity. So perhaps this is all there is to it: Instructions or commands of the political sovereign are what we call law.

This is the basic insight that Austin tried to work out.¹ The insight has two main components: that law always has the form of a command, and that it necessarily originates from the political

sovereign. Hart found both of these components fraught with difficulties. Only a small fraction of the law may be said to consist of commands; and, more importantly, we cannot explicate the sources of law in terms of political sovereignty because the very idea or concept of sovereignty is a juridical one. Law partly constitutes our conceptions of sovereignty; it cannot be reduced to it. I will take up these two points in turn.

According to Austin, each and every legal norm is a *command*, namely, the expression of a wish by a person (or persons), that some others behave in a certain way, backed by a threat of sanction: "Do this or else. . . ." In chapter 3 of *The Concept of Law*, Hart explains in great detail that most laws are not of the kind that can be reduced to the form of "Do this or else. . . ." The two main and closely related problems with the "Do this or else. . . ." model of laws are, first, that the model assumes that laws are there to impose obligations ("do/don't do . . ."); and second, it assumes that every legal norm is backed by a threat of sanction ("or else . . ."). And of course, these two aspects are very closely related; together they form the idea of a command.

Hart acknowledges that some laws have this kind of structure. Clear examples are the main provisions of a criminal code, imposing obligations to refrain from certain modes of conduct, backed by the threat of punishment if one does not comply. But, as Hart rightly pointed out, most of the law is not really like that. A great many laws are not there to impose an obligation.² For example, laws often confer a *legal power*. They prescribe manners in which an agent may introduce a change in the preexisting normative relations that obtain.³ Consider the formation of a contract, for example. A contract is formed by an offer and the acceptance of the offer. Laws determine what constitutes an offer, an acceptance of it, and the legal ramifications that follow from

² To be a bit more accurate, we should acknowledge that in contemporary legal systems, a huge amount of administrative legal regulation takes the form of "do this or else." Many of these regulatory legal norms are enacted by administrative agencies.

³ Hart, *The Concept of Law*, 27–35. The definition of "legal power" that Hart adopted comes from W. N. Hohfeld's influential analysis of legal rights; see his *Fundamental Legal Conceptions*.

the formation of contractual relations of various kinds. The laws that determine how a legally binding contract is formed do not have the structure of “do this or else”; the law is not in the business of obligating anyone to form a contract—neither to make an offer nor to accept one. The structure of such norms is entirely conditional: *If* you want to form a legally binding contract, this is *how* it is done. But again, you do not have to make a legal offer or to accept one. In other words, the law here does not impose any obligation; it confers a power—the power to create a new set of rights and duties that would be legally recognized.

As Hart admits, however, Austin was not unaware of this problem. Nevertheless, he maintained that the “do this or else . . .” model applies to all laws, albeit often indirectly. The laws that prescribe modes of forming a contract, for example, in effect tell the subjects: Do this . . . or else your attempt to form a legally binding contract would fail. True, there is no straightforward sanction for noncompliance that looms here. But there is this “or else”: You fail to accomplish the legal consequences you may have wanted to achieve. The sanction, so to speak, consists in the *legal nullity* of your action. Hart found this solution very inadequate, and for two main reasons.

First, Hart observed that there is a conceptual distinction between norms that tell you “do this . . . or else,” and norms that constitute or determine ways of creating new normative relations such as a rule that confers a power to make a contract. In the former case, there is a clear distinction between the action requirement and the sanction element that would be applied in case one fails to perform. We can fully understand the action requirement without the sanction element. In the latter case, however, no such distinction is possible. A rule that determines what counts as a valid contract only makes sense on the basis of the assumption that, without complying with the rule, you have not formed a valid contract. We just cannot separate the action requirement from the legal nullity as a consequence of noncompliance.⁴

Second, Austin’s rejoinder fails to notice that there is a very important difference between the function of a law that purports

to impose an obligation, such as the obligation not to murder or to steal, and the function of a power-conferring law. The main function of the latter is not to impose any obligations, not even obliquely or indirectly. The law is simply not in the business of telling people how to behave; it is in the business of providing a service.⁵ But then the question is: What kind of service? Is it not the service of having one’s rights secured by the coercive powers of the law?

Think about it this way: Why would parties to a transaction care whether their exchange of promises is legally recognized as a contract? A very plausible answer is that they care about it because they would want to have the enforcement services of the law at their disposal in case something goes wrong. And this is precisely how Kelsen saw it. He shared Hart’s view that Austin’s command model is too simplistic, failing to see the major role that power-conferring norms serve in the law. However, Kelsen shared Austin’s view that law’s enforcing mechanisms, its ability to compel behavior by the use of force, is what makes the law a unique instrument of social control. Consequently, Kelsen came up with a rather counterintuitive analysis of legal norms, whereby all legal norms are ultimately addressed to officials, instructing them to use force if certain conditions obtain. Under this conception, the kinds of norms we would normally regard as individual legal norms (such as a norm that determines what counts as a contract, or a norm prohibiting murder, and so forth) are actually just fragments of laws, part of a list of conditions addressed to officials determining when the use of force will be mandated. All laws are instructions to officials of the form: “If conditions $C_{1\dots n}$ obtain, use force against Y to compel result X .” Thus, Kelsen seems to have shared Austin’s view that laws are basically commands or instructions, but the commands are ultimately addressed to those who may use force to compel behavior.⁶

⁵ *Ibid.*, 33–35.

⁶ Kelsen, *GT*, 63. Kelsen did not actually invent this idea of laws as fragments of instructions to officials; the idea originates with Bentham, *An Introduction to the Principles of Morals and Legislation*, 330ff.

Understandably, Hart did not find it difficult to ridicule Kelsen's analysis of legal norms. Kelsen's analysis misses the crucial point that the main function of most legal norms is to actually *guide* the conduct of the law's subjects. The law is there to provide reasons for its subjects to behave in certain ways, not to tell officials when to use force to compel behavior. Hart demonstrated this point by the distinction between a tax and a fine. In both cases, the instruction to the relevant officials is the same: If conditions C_1, \dots, C_n obtain, extract \$X from Y. But there is this crucial difference: When the law imposes the penalty of a fine, its main aim is to discourage the type of conduct in question, and the fine would be extracted only if the law failed in its main objective—to prevent people from doing whatever it is for which they may be fined. Contrary to this, taxes are typically not meant to discourage the type of conduct for which one is taxed. Income tax is not meant to instruct people to refrain from gaining income—quite the opposite. Thus Hart concludes that Kelsen's analysis of legal norms in terms of instructions addressed to officials is obviously flawed since it misses entirely the main action-guiding function that most laws have.⁷

It may be worth pausing here for a while to see what exactly this debate about the nature of legal norms is about. And it is not about one thing; there are at least three different questions that are entangled in this debate among Austin, Kelsen, and Hart. Partly, this is a debate about the main functions of law in society and how closely those functions are tied to the use of force, and law's ability to impose sanctions; partly, it is a debate about the question of whether laws are essentially instructions addressed by some people to others; and partly, though least importantly, the debate is about the question of whether all legal norms can be reduced to one general form.

Undoubtedly, Hart was right about the third point. Both Austin's assumption that laws are basically commands of the form "do this . . . or else," and Kelsen's suggestion to see all laws as a list of instructions to officials when and how to use force, suffer from

⁷ Hart, *The Concept of Law*, 35–41. (This is one of the only places in *The Concept of Law* where Hart explicitly refers to Kelsen.)

the same flaw of oversimplification (or "distortion as the price of uniformity," as Hart called it⁸). In every developed legal system, there are many different types of norms, and there is no reason to assume that all those types can be reduced to one basic model. But the other two questions are much more complicated. Consider, first, the idea of sanctions: Austin and Kelsen share the view that there is a very intimate connection between law's ability to impose sanctions for noncompliance and the main functions of law in society. They share the view that it is this element of using force to compel compliance that makes the law a unique normative system. As Kelsen explicitly stated, the main function of law in our societies is to monopolize the use of force.⁹ And although Kelsen does not quite say it, I think that he shared Austin's view that law is essentially an instrument of political sovereignty. Undoubtedly, this view belongs to a long tradition in political thought emanating from Hobbes, which regards the main rationale of political sovereignty in terms of monopolizing the use of force in order to pacify society and ensure peaceful coexistence of individuals. To a considerable extent, Hart's arguments in *The Concept of Law* are meant to challenge this Hobbesian tradition in jurisprudence. The challenge is twofold. One concerns the variety of legal norms and their different social functions. The second line of criticism, as we shall see shortly, concerns the tight connection that the Hobbesian tradition in jurisprudence forged between law and political sovereignty. I will argue that both of these challenges are very important, but neither of them is entirely successful. Let me first consider the role of sanctions in understanding the functions of law in society. Later we will discuss Hart's challenge to the idea that law is an instrument of political sovereignty.

The role of sanctions in the law and the use of force, Hart maintained, was greatly exaggerated by Austin and Kelsen. A closer attention to the various functions of different types of legal norms and institutions would show that the law does not always need an element of sanction in order to fulfill its functions. Let us be careful not to misunderstand the debate here. Hart's main

⁸ *Ibid.*, 33.

⁹ Kelsen, *GT*, 18–19.

point is not about human nature; it is not about the question of whether most people are essentially law abiding and would normally follow the law without being threatened by sanctions. Although Hart also thought that, indeed, most people in a civilized legal system would normally want to know what the law requires in order to do the right thing, and the threat of sanction is less important than traditional Hobbesians might think, this is not the main issue. The main question is about something that is more central to philosophy of law: What are the kinds of problems and needs that law is there to solve or respond to, and are they tied so closely to law's coercive aspect as the Hobbesian tradition would have it? In other words, the question is how central the element of force is to the functions law serves in our social lives. Perhaps we would be better served here by an argument Joseph Raz suggested in support of Hart's position about this issue.¹⁰

Raz asks us to entertain the following thought experiment: Let us imagine a world in which no element of sanction would be required. Let us assume that there is a world of angels, as it were, which is identical to our world, with only this difference: Whatever it is in our world that requires the law to threaten with sanctions for noncompliance does not prevail with respect to the angels. Now the relevant question is this: Would this world of angels need various institutions that would resemble the kinds of institutions we call *law* in our society? If the answer is affirmative, we should conclude that the functions of law are not so closely tied to law's sanction element as the Hobbesian tradition maintains. And Raz's answer is that, indeed, we should be able to see that there are a great many institutions that even angels would need that look very much like the kinds of institutions we call law around here. For example, the angels would need normative solutions to large-scale coordination problems; they would need mechanisms for determining what needs to be done in circumstances where reasonable angels may disagree, but some kind of a collective decision is required; they would need mechanisms for resolving conflicting views between individuals about such matters; and they would need institutions entrusted with

determining the relevant facts in conflictual circumstances, and the like.¹¹ Thus, Raz concludes, with Hart, that the law's coercive element—its ability to use force to compel compliance—is much less important than people tend to think. Even without the need to use force, there are many needs and functions that legal institutions and various legal norms serve for us.

I am not entirely convinced by this thought experiment. Although I find its conclusion generally correct, the argument underestimates the importance of the coercive element of law. Recent advances in game theory in economics and cognitive psychology have shown that there are countless situations in which rational people have a very strong incentive to act against their own self-interest as well as against the common good. One of the main functions of law, manifest in a great variety of legal arrangements, is to solve these kinds of problems by compelling individuals to overcome their initial incentive to defect from cooperative behavior or to act against their own long-term self-interest.¹² By threatening with sanctions for noncompliance, the law is able to provide a service for the parties concerned: It enables them to behave cooperatively, generally in the agents' best interest, in spite of their rational incentive to do the contrary. As an example, consider the case of taxes. It is in our own interest, as well as the common good, to have people pay taxes that enable the production of goods and services that are important and otherwise could not be produced. However, each potential taxpayer has a very strong rational incentive to defect; from the perspective of each individual, the best outcome is achieved if most others pay the taxes while they do not. And since every individual knows this about themselves and the others, everybody's incentive to pay is hugely diminished by the fear that others have a strong incentive to defect

¹¹ Notice that the need for these institutions suggests the need for both legislative and adjudicative institutions, very similar to what we regard as legislation and adjudication in our world.

¹² It is not my intention to imply that game theory models provide the best framework for analyzing such cases. These models tend to be framed in terms of an individual's subjective preferences, and they take preferences as given, without any concern for reasons for action and responsiveness to reasons.

as well. By compelling everybody to pay taxes with the threat of sanction, the law ensures that our rational self-interest is attained.

The problem with Raz's thought experiment is that it is crucially ambiguous about this issue, because the outcome depends on how we define the rationality of the angels. If we define their rationality in ways that would make them susceptible to the relevant kind of rationality failures that we have, the conclusion would be that "law" in a world of angels would also need to incorporate some sanction elements. Yet if we define the rationality of the angels to exclude such failures, then it becomes very unclear how much we can learn from this thought experiment. A world of such perfectly rational angels might be just too remote from ours to warrant any significant conclusions about the functions of law in our society. The conclusion I am heading toward is that the truth about the importance of the sanction element of law is somewhere in between the Austin and Kelsen view and that of Hart and Raz. No doubt the latter are right that it is a mistake to forge too tight a connection between law's ability to use force to compel compliance with the main functions of law in society. But we should be careful not to overstate this mistake; even if not all, a great many functions of law in solving the kinds of problems it is there to solve are made possible by its ability to change people's incentives and compel behavior by the threat of sanctions.

The Sovereign

According to Austin, what makes normative instructions distinctively legal consists, first and foremost, in the origins of the instruction. If, and only if, the command or instruction emanates from the political sovereign, then it is legal. Since Austin's theory of law is categorically reductive, he had to offer a definition of sovereignty that is given in nonjuridical terms. After all, the whole point of Austin's theory is to give an explanation of law in terms of something else, more basic and factual in nature. And it is precisely this attempt to reduce law to facts of a non-normative kind that renders Austin's theory a paradigmatic example of legal positivism. Thus, Austin defined political sovereignty

in sociological terms, consisting in social facts about habits of obedience: A person, or group of persons, who is *habitually obeyed* by a certain population and not in the habit of obeying anyone else, is the political sovereign.¹³

An objection immediately comes to mind: Isn't the very idea of obedience a normative one? To say that one person *obeys* another typically implies that the person being obeyed is in a normative position or has the authority to instruct the other under the circumstances. But this is not a serious worry. There is nothing wrong with the use of "obedience" to describe a situation where one person does what the other tells her to do, without any hierarchical or authoritative relations between them. The word "obey" can be used in purely factual (that is, non-normative) terms, and this is how Austin must have intended it.¹⁴

Hart's main difficulty with the characterization of sovereignty in terms of habits of obedience is different: Hart's argument aims to show that the idea of sovereignty is, essentially, a juridical one.¹⁵ Sovereignty cannot be at the foundations of law because it is partly the law that constitutes what sovereignty is and who counts as the particular sovereign in any given population. I will not describe in detail Hart's argument. The basic intuition that lies behind it, however, is not difficult to explain. Think about the law as a kind of a game in which there is only one basic rule: We do whatever The Leader tells us to do. Would it make sense to say that the game *consists in* what the particular person, say X, who happens to be The Leader, commands? Surely the appropriate description is that the game consists in what X *as* The Leader tells us to do. Which means that first we need some rules that constitute the role of The Leader, and rules that determine how X becomes one, before we can ascribe to the commands of X the

¹³ Austin, *The Province of Jurisprudence Determined*.

¹⁴ It is perfectly OK, for example, to say that X habitually obeys the neighborhood bully, without implying that the bully is somehow authorized to terrorize X. And even when we say, for example, that an object that falls from my desk to the floor "obeys the laws of gravitation," perhaps we use the word "obey" somewhat figuratively, but it is not a terrible stretch.

¹⁵ Hart, *The Concept of Law*, chap. 4.

significance that they have in this game. This, I think, is the basic argument that lies behind Hart's objection to Austin's theory of law.

The game analogy is not a coincidence. It is one that Hart himself often used, and for good reason: It is evident in our practices of playing games that rules have a foundational, that is, constitutive, status. Games typically have rules about what a player is required to do, or may or may not do; but this is only part of the story. In addition to this regulative function of rules, the rules of the game *constitute* what the game is, and the various roles that participants in the game have. And, at least in this respect, law is very much like a game. Before anyone can be said to have issued a legal instruction or a command, there must first be some rules that constitute the role of that person to make the kind of move that would have the legal significance that it does.

One may wonder, however, whether Austin would disagree. After all, he did suggest that sovereignty is constituted by the habits of obedience that prevail in a given population. If there is a certain population that is in a habit of obeying *X*, and *X* himself is not in the habit of obeying anyone else, then, and only then, *X* is the sovereign. So perhaps a plausible interpretation of Austin would be that general habits of obedience constitute what sovereignty is. How is it different from Hart's insistence that sovereignty, just like the role of the umpire in a game, is a role that is constituted by rules? Hart has two related answers. First, he claims that the tools Austin provides would not be sufficient to explain even the simplest form of a legal transition from one person *qua* sovereign to another. Suppose *X* is a sovereign in society *S*, by meeting Austin's definition; but then *X* passes away and *Y* takes over as the legal successor to *X*, and is now the lawful sovereign in *S*. Surely, at the first stages of *Y*'s rule, it cannot be said that *Y* enjoys a *habit of obedience* by members of *S*. Habits take time to evolve. Now, of course we all understand what would make *Y* the legal successor to *X*: Legal systems tend to have rules of transition and continuity that determine such matters—such as who gets to replace *X* in his legal-political role when *X* can no longer function as the sovereign. But there seems to be nothing in Austin's account of

sovereignty to explain how such rules of transition are possible. Surely they cannot be constituted by habits of obedience, as there are none, at least not for a while.¹⁶

Second, and this may lie at the heart of the previous problem as well, Austin missed the crucial distinction between a mere *regularity of behavior* and an instance of *following a rule*. A habit of obedience is a regularity of behavior. Many things we do regularly, however, are not necessarily instances of following a rule. We regularly eat lunch, or frequently go to a movie, and so forth, but there is no rule that requires such conduct. In eating lunch, one does not follow a rule. Reasons for action may occur in some regular fashion, and when we comply with such reasons, we exhibit a regular pattern of behavior. When we follow a rule, however, we regard the rule itself as a reason for doing what it requires. Rules have a normative significance; the existence of the rule is something that figures in our practical reasoning, it is something that counts in favor of doing what the rule requires.

Thus Hart's critique of Austin is twofold. First, Austin failed to recognize that sovereignty is an institution, and institutions are constituted by rules. Second, he failed to recognize that rules are not merely regularities of behavior. These two points, taken together, are aimed to show that it is not possible to offer a reductive explanation of legal validity in terms of a sociological conception of sovereignty. Let me be clear about Hart's argument: Hart does not need to deny that it is possible to come up with a definition of political sovereignty that is purely sociological, as it were. The point is that no such characterization of sovereignty would capture the kind of sovereignty that we are after, namely, the kind that explains the role of the sovereign as a source of law, as the kind of entity whose directives constitute legal norms. In order to get the relevant kind of sovereignty—that is, to identify the agents whose actions or decisions create the law—one would first need to know the rules that constitute sovereignty as a legally significant entity, the kind of entity or institution generally recognized to be the source of legal norms. In other words, what we need is

¹⁶ See Hart, *The Concept of Law*, chap. 4.

an institutional account of sovereignty, and such an account must be based on rules that constitute the institution. Second, as noted, rules are not merely regularities of behavior. The fact, if it is one, that there is a habit—a regularity of behavior—in accordance with *X*'s instructions would not be sufficient to explain what makes *X* the political sovereign in the relevant sense. What we need, Hart concludes, is "the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law."¹⁷

Notice that there is one crucial respect in which Hart and Kelsen agree here. They both share the view that we need some normative framework already in place before we can come to interpret certain actions or events to have the legal significance that they do. For Kelsen, this normative framework is provided by the presupposition of the basic norm. Hart, as we shall see in a moment, retains Austin's reductive methodology and seeks to provide the requisite normative framework in terms of the idea of social rules. In other words, Hart employs the idea of social rules to serve the same theoretical functions that Kelsen ascribed to the basic norm. But his account of social rules remains, quite self-consciously, a reductive one. It is not Austin's methodology that Hart rejects—only the building blocks that form the foundations of law. The following section takes up the details of this account.

HOW IS LAW CONSTITUTED BY SOCIAL RULES?

Hart begins his account of the nature of law by introducing a distinction between *primary* and *secondary* rules.¹⁸ Primary rules prescribe certain modes of conduct, such as "Do this . . ." or "Don't do that. . ." Their object is the guidance of behavior. Secondary rules are rules about rules: They take other rules as their object and guide ways in which rules can be created, modified, or abolished, or ways in which interpretation of rules is to

be adjudicated, and such. Hart employs this distinction for two purposes. His first purpose is to show that in every developed legal system there are rules of both kinds. Every legal system would have, in addition to its primary rules of conduct, a whole range of secondary rules prescribing ways in which other rules may be created, modified, or interpreted. (In fact, power-conferring rules, like those discussed in the previous section, are of such secondary nature.) So this is another nail in the coffin of Austin's command model of law; commands are primary rules of conduct. But the law must contain, in addition to such primary rules, many kinds of secondary rules that are not directed to guide conduct but to enable various agents to create new norms or modify existing ones.

The second purpose of the introduction of secondary rules is to show how rules can constitute legal institutions. There is, Hart famously claimed, in every community that has a legal system, a special kind of secondary rules, which he calls *rules of recognition*—rules that identify certain types of actions or events as the kinds of actions or events that create law in that community. In the existence of such rules of recognition, Hart says, we find "the germ of the idea of legal validity."¹⁹ The rules of recognition are social rules that a community follows in identifying ways in which law is created, modified, or abolished, that is, these are the rules that constitute what counts as sources of legally valid norms in a given community.²⁰ As we have already seen in the previous chapter, a legal chain of validity always comes to an end. In every legal system we reach a point where some account must be given, in nonlegal terms, to explain what grants certain actions and events the legal significance that they have. There must be something more basic or foundational that grounds the very idea of legality. If, as Hart suggests, rules ground the idea

¹⁹ *Ibid.*, 93.

²⁰ My formulation in the text is not entirely accurate: Hart identified three main types of secondary rules that legal systems would have: rules of recognition, rules of change, and rules of adjudication. Perhaps I am including in the rules of recognition elements Hart classified under the rules of change. Nothing in my subsequent argument depends on this question of classification, however.

¹⁷ Hart, *The Concept of Law*, 78.

¹⁸ *Ibid.*, 78–79.

of legality, then those rules must be more foundational than the legal institutions that are constituted by them—hence the idea of social rules.

Hart also maintained that because various rules of recognition might come into conflict, legal systems would typically have provisions for some order of superiority, whereby some sources of law are subordinate to others (for example, state law is subordinate to federal law; judicial decisions might be subordinate to legislation, and the like). In other words, rules of recognition would typically manifest a hierarchical structure subsumed under one main or *master* rule of recognition. The idea that legal systems are hierarchically structured is familiar from Kelsen's theory of legal systems and his postulates about the basic norm. We discussed this in chapter 1, and the same doubts we had about the idea that in every legal system there is one basic norm should apply to Hart's rule of recognition as well. It is probably an oversimplification to assume that in every legal system there is one master rule of recognition. More plausibly, there are several rules of recognition, and the potential conflicts between them are not necessarily resolved.

No other idea is more closely associated with Hart's theory of law than the idea that legality is constituted by social rules of recognition. The novelty in Hart's account, however, consists in the idea that these are *social* rules. The theoretical function of the rules of recognition is basically the same as the function ascribed by Kelsen to the basic norm. The difference between Hart's rule of recognition and Kelsen's basic norm is only a difference in the nature of these norms. For Kelsen, as we have seen, it is a presupposition; for Hart, it is an actual social norm followed by a given community. There is one point where Hart explicitly draws this contrast between the rules of recognition and the basic norm, and it is worth quoting in full:

Some writers, who have emphasized the legal ultimacy of the rule of recognition, have expressed this by saying that, whereas the legal validity of other rules of the system can be demonstrated by reference to it, its own validity cannot

be demonstrated but is "assumed" or "postulated" or is a "hypothesis." This may, however, be seriously misleading.

And then Hart explains what is misleading about the idea that the rule of recognition/basic norm is "postulated" or presupposed:

First, a person who seriously asserts the validity of some given rule of law . . . himself makes use of a rule of recognition which *he accepts* as appropriate for identifying the law. Secondly, it is the case that this rule of recognition . . . is not only accepted by him but is *the rule of recognition actually accepted and employed* in the general operation of the system. If the truth of this presupposition were doubted, it could be *established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications.*²¹ (Emphasis mine)

I hope that we can now see very clearly that Hart generally accepts Kelsen's theory of the basic norm, while explicitly rejecting its antireductionist underpinning. As we have seen in the previous chapter, Kelsen was under pressure to concede that the content of the basic norm is determined by social practice. Hart draws the same conclusion, which for him simply means that the whole idea of presupposing the basic norm is redundant. Once we recognize, as we should, that in identifying the sources of law, judges and other officials follow certain rules, those rules need not be presupposed. They are actual social rules followed and thus "accepted" by the relevant community. In other words, Hart's idea of the rule of recognition is essentially the idea of Kelsen's basic norm characterized reductively in terms of social facts that prevail in a given community. The relevant social facts, as we shall see in a moment, are facts about people's conduct, beliefs, and attitudes.

What Hart needs, therefore, is a detailed account of what social rules are, and how social rules can ground both the ideas of legal validity and the normativity we ascribe to law. Hart's answer

²¹ Hart, *The Concept of Law*, 105.

to these questions, given by what has come to be called the *practice theory of rules*, remains reductive all the way through:

A social rule, say *R*, exists in a population *S*, Hart maintained, if and only if the following conditions obtain:

- (1) Most members of *S* regularly conform in their behavior to the content of *R*, and
- (2) most members of *S* accept *R* as a rule, which means that
 - (a) for most members of *S*, the existence of *R* constitutes a reason for action in accordance to *R*,
 - (b) and members of *S* tend to employ *R* and refer to it as grounds for exerting pressure on other members to conform to *R* and as grounds for criticizing deviations from conformity to *R*.²²

As we can see, according to Hart, the existence of a social rule consists of actual patterns of *conduct*, *beliefs*, and *attitudes*: We have a social rule when there is a component of conduct or behavior—that is, the regular conformity with the rule or the regularity of conduct in accordance with it; and a complex component of “acceptance” of the rule, which consists of (1) a belief shared by the population that the existence of the rule provides them with a reason for action and (2) a shared attitude of a positive endorsement of the rule that is manifest in its use as grounds of exerting pressure on others to comply as well, or criticizing them when they do not. Clearly, this is a reductive account of social rules. It purports to explain what social rules are in terms of overt behavior in a given social group, accompanied by certain beliefs and attitudes actually entertained by (most) members of that group. Notice that this is also an aggregative account because it purports to explain a social phenomenon in terms of the conduct, beliefs, and attitudes of individual members of the relevant population. If most members of a given population behave in a certain way, and share some beliefs and attitudes with respect to that behavior, then we have “the idea of a rule,” which is, according to Hart, the foundation of a legal system.

²² Hart’s explanation of the nature of social rules is scattered around several places in *The Concept of Law*. Most of the essential points are at 82–86.

This strong reductionism in Hart’s account of social rules has been missed by many commentators, and partly due to a rather cryptic account Hart himself provided of various ways in which social rules can be observed and accounted for. Few pages in *The Concept of Law* generated more confusion than Hart’s distinction between the *internal* and *external* aspects of rules.

“When a social group has certain rules of conduct,” Hart says, it is possible to make different kinds of observations about the rules:

It is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct.

The former is the external point of view and the latter the internal one. And then Hart immediately clarifies that the external point of view can be varied:

For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from the outside refer to the way in which they are concerned with them from the internal point of view. [Or,] . . . we can if we choose to occupy the position of an observer who does not even refer in this way to the internal point of view of the group. Such an observer is content merely to record the regularities of observable behavior.²³

Hart identifies three possible ways in which one can account for social rules: the internal point of view, which is the vantage point of members of the group who “accept” the rule—that is, regard the rule as reason for their action; an external point of view, which reports on the internal point of view without sharing the same beliefs and attitudes that members of the group do; and, what we can call an extreme external point of view, which only reports on the rules in terms of observable regularities of behavior. One can surmise that Hart’s reason to mention the extreme version of the external point of view was, yet again, to show the flaws

²³ Hart, *The Concept of Law*, 87.

in Austin's simplistic reductionism. As mentioned earlier, Hart thought that Austin's definition of sovereignty in terms of habits of obedience is seriously flawed, partly because it does not recognize the crucial distinction between conformity to a regularity of behavior and instances of following a rule. It is as if Austin's characterization of sovereignty confines itself to an extreme external point of view, and thus is grossly inadequate for that reason alone. Any plausible account of social rules, Hart claims, must take into account the fact that people share the internal point of view. This is the point of view of the members of the group who regard the rules as binding—that is, for whom the rules provide reasons for action and reasons for exerting pressure on other members to comply as well.

If you recall Kelsen's discussion of the normativity of law, you might find it rather curious that Hart's distinctions seem less nuanced than Kelsen's. According to Hart, one can either describe social rules from the vantage point of a committed member, that is, from the vantage point of a person who regards the relevant rules as *binding* (reason-giving), or else one can report on such a point of view in the form of a report on others' conduct, beliefs, and attitudes. However, in addition to the internal point of view, which Kelsen clearly recognized as crucial to any account of a normative system, he had also recognized the possibility that one might deploy arguments about a normative system *as if* one accepts the internal point of view. Has Hart just failed to notice that there is this third possibility, the possibility of a *presumed* internal point of view or, as Raz has called it, detached normative statements?

It is possible that Hart just failed to notice that the distinctions he offered can be more fine-grained and that there is this possibility of making detached normative statements. But we should not lose sight of Hart's project and his aim in drawing these basic distinctions. And the main objective here is not, I think, a critique of Austin, but it is actually a critique of Kelsen. What Hart wants to show by these distinctions is not simply the importance of the internal point of view. His aim, I believe, was to show how the internal point of view can be accounted for in terms of people's

beliefs and attitudes. In other words, the upshot of the distinction is about the *external* point of view, not the internal one. The contrast that Hart draws is between Austin's account, which he sees as an account that is confined to the extreme-external point of view, and his own, which is the account of an observer who "may, without accepting the rules himself, assert that the group accepts the rules, and thus may from the outside refer to the way in which *they* are concerned with them from the internal point of view."²⁴ Hart's aim is to lay the ground for a reductive account of social rules, one that explains the internal point of view in terms of people's behavior, beliefs, and attitudes. The fact that there is also the possibility of talking about social rules as if one regards them as binding is beside the point for these purposes. The point is to show that there is nothing amiss about explaining the normativity of a system of rules from the outside, as it were. We do not need to *presuppose* anything when we explain law's underlying normative framework. What we need is a kind of sociological account that explains the fact, the complex social fact, that people follow certain rules. And this account can be given, Hart claims, in terms of observing people's actual modes of conduct, the beliefs they have about their conduct, and their accompanying attitudes.

Let me try to sum this up. Hart clearly shares Kelsen's insight that the only way in which we can explain the idea of legality is by pointing to norms that grant certain types of actions and events the legal significance that we ascribe to them. There must be some norms that identify the ways in which law is created and modified in the relevant community. These are the *rules of recognition*. However, Hart does not share Kelsen's view that these norms have to be presupposed. The *rules of recognition* are social rules, actually followed (mostly) by judges and other legal officials, and, as such, can be observed and accounted for in terms of observing people's conduct, beliefs, and attitudes.

Some commentators have pointed out that there is an inherent difficulty in Hart's position: If the rules of recognition are, as Hart claims, the rules followed by judges and other officials, and that

is how we would be able to identify them, how can those same rules constitute the role of such people *as* judges and officials? After all, it was Hart himself who repeatedly emphasized that we can only identify certain individuals qua judges or other legal officials on the basis of rules that confer the relevant legal powers on them and thus constitute their institutional roles. So it seems that we need some legal rules to explain who counts as “an official,” but then we say that what counts as law is determined by the rules that those officials follow. Is there a chicken and egg problem here?²⁵ I do not think so. It is true that when Hart answers the question, whose rules the rules of recognition are? he points out that, mostly, they are the rules followed by judges and other legal officials. It is also true that Hart claims, and rightly so, that the role of such officials, qua officials, is itself constituted by rules. But there is no vicious circularity here. Consider, for example, the game of chess. As an activity of a particular kind—as a practice, if you will—chess is clearly constituted by its rules. Suppose you ask: *Whose* rules are they? The answer is, naturally, that these are rules followed by those who play the game—by chess players. And who is a chess player? Surely, the role of a chess player is also constituted by the rules of the game. You are a chess player if you play the game, that is, engage in the activity by following the rules of chess. Perhaps there is an air of paradox here, but there is no real paradox involved. When we have a set of rules that constitute a certain type of activity—such as playing chess or performing a theater play—the rules can constitute both the type of activity in question and the particular roles that people occupy within the activity. And, of course, the rules are those that are actually followed by the people who engage in the activity in question. In other words, the rules followed by those who play a particular institutional role can be the same rules that constitute the institutional role that forms part of an activity generally constituted by rules.²⁶

²⁵ See Shapiro, “On Hart’s Way Out.”

²⁶ Perhaps part of the confusion stems from the fact that Hart seems to have assumed that constitutive rules are secondary rules—that is, rules about rules; and he clearly assumes that the rules of recognition are secondary rules. The chess example shows that, as a generalization, Hart erred here. The rules of chess are

None of this means that Hart’s theory is unproblematic. Over the years, Hart’s practice theory of social rules came under considerable pressure. There was a sense that Hart had not provided an explanation for the main element that would render the idea of rule-following rational or intelligible, namely, the reasons for following a rule. Hart’s practice theory of rules seemed to provide only an account of what one would observe when a population follows a rule, namely, that people exhibit a regularity of behavior accompanied by some beliefs and attitudes they share about that regularity. But this account tells us nothing about the reasons people might have for following rules; Hart’s account seems to be silent on the question of what makes it rational or intelligible for people to regard the relevant social norms as binding or obligatory. Strangely enough, it was Hart himself who gave us a very good reason to be concerned with this question (even though he must have thought that he provided us with reasons not to be concerned with this issue).

Consider a situation in which a gunman orders you to hand over your money or else he will shoot you. Clearly, this is not a legal order. But as Hart rightly pointed out, according to Austin’s command theory of law, the only difference between the gunman’s order and the orders of law consists in the fact that, as it happens, the gunman is not the political sovereign. Yet there is a clear sense, Hart claimed, that Austin’s view misses something of crucial importance: It would be true to say that when faced with the gunman’s order, the victim is “obliged” to hand over his money, but it would be wrong to suggest that the victim has “an obligation” or a “duty” to do so. However, unlike the gunman, the law often purports to create obligations; if a legal norm requires a certain type of conduct, the requirement purports to impose an *obligation* to comply.²⁷ And this is precisely the question about the normativity of law that we have sought all along: the question of how to explain this obligatory or binding element of legal norms.

not secondary rules; they are rules of conduct, specifying permissible and impermissible moves and their significance within the game. Nevertheless, the rules of chess are constitutive—they constitute what the game is.

²⁷ Hart, *The Concept of Law*, 80.

Furthermore, the same problem applies, and perhaps even more forcefully, to the normative aspect of the rules of recognition. Why, some commentators have asked, should judges and other legal officials be bound by the rules of recognition; what makes them obligatory in any sense? The problem is that though Hart nicely demonstrated the question, he has provided no answer; there is nothing in the practice theory of rules to explain why people would regard legal norms as binding, except pointing to the social fact that they do. Actually, Hart thought that this was enough; a philosophical account of the nature of law—as opposed to a normative, moral-political philosophy—can do no more than that. It can only point out that law has this normative element, and that wherever there is a functioning legal system in place, most members of the relevant population *regard* the requirements of law as binding—as giving them reasons for action and reasons for exerting pressure on other members to comply as well. Whether these reasons are moral reasons, and whether they are adequate to the task, are not questions that need to be answered within a general theory of jurisprudence.

I think that Hart is only partly correct about this issue. Consider the gunman situation again: The crucial difference between the gunman scenario and the law is much better explained by introducing the concept of authority. The gunman is only interested in getting your money. He does not claim—at least there is nothing in the situation to force him to claim—that he is in a position that authorizes him to order you to hand over your money. In other words, the gunman makes no claim to be a legitimate authority or to have a legitimate authoritative claim on your conduct. However, as Joseph Raz famously argued, it is an essential aspect of law that it always *claims* to be a legitimate authority.²⁸ When the law makes a claim to your money (by imposing a tax, or a fine, or whatever), it makes this claim as an exercise of its putative legitimate authority. And that is the sense in which legal requirements purport to create obligations; they are requirements based on claims of legitimate political authority. Needless to say, Raz does not suggest that law's claim to be a legitimate

authority is generally a sound one, morally or otherwise justified. Whether the law's claim to the legitimacy of its authority is warranted or not—either in particular cases, or wholesale—is a separate, moral-political question, and the answers would vary from case to case. But it is essential to an understanding of what the law is, that it always makes this kind of claim—that it claims to be a legitimate political authority. What lessons can be drawn from Raz's insight, and how Hart's views need to be modified to accommodate those lessons, is the topic of our next chapter.

SUGGESTED FURTHER READINGS

- Coleman, *Hart's Postscript: Essays on the Postscript to The Concept of Law*.
 Dworkin, *Taking Rights Seriously*.
 Gavison, *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart*.
 MacCormick, *H.L.A. Hart*.