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BACK TO HART

The essay addresses two different senses of important "problems" for contemporary legal philosophy. In the first case, the "problem" is having forgotten things we learned from H.L.A. Hart, and, partly as a result, encouraging pointless metaphysical inquiries in other directions that take us very far from questions about the nature of law and legal reasoning. In the second case, the "problem" is to attend more carefully to Hart's views and his philosophical context to think about the problem of theoretical disagreement, and to understand the way in which later commentators have misunderstood his behaviorist (Rylean) analysis of "accepting a rule from an internal point of view."

Key words: *H.L.A. Hart*. – *Gilbert Ryle*. – *Internal point of view*. – *Theoretical disagreement*. – *Metaphysical grounding*.

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Our subject – the most important "problem" in contemporary legal philosophy – is ambiguous in a funny way, between current puzzles or questions that are very important to address, versus problems in legal philosophy in the sense of features of contemporary legal philosophy that handicap intellectual progress. I am going to talk about both. And I'm going to start with what I take to be the problematic situation in legal philosophy, especially in Anglophone legal philosophy, and especially in the United States.[1] So those of you who are working in legal philosophy in jurisdictions not afflicted with these problems, you can all be grateful, as it were. But given the hegemony of the English language in academia these days, students of legal philosophy everywhere should be concerned.

My worry is that legal philosophy in the United States is seriously backsliding. We are losing sight of a lot of things that, I thought, we had learned from H.L.A. Hart and from Hans Kelsen, though often Kelsen through Hart. To be sure, I think we learned a lot from aspects of Dworkin's engagement with Hart, from Raz's additions to and disagreements with Hart, and also from the major natural law challenges to Hart – I'm thinking of John Finnis and Mark Murphy. Even those latter challenges, in effect, accepted a lot of Hart's way of framing the issues and questions of legal philosophy. In my own work, I only took issue with Hart, as it were, at the margins, namely the questions about the methodology of legal philosophy (Leiter 2007),[2] reflected in my earlier naturalistic challenges to aspects of Hart's legal philosophy. The real problem now is well-captured by something that my friend Leslie Green often says, that is very apt: "too many legal philosophers want to say something new rather than something true." And, of course, the incentive structure of academia encourages finding something new to say, regardless of whether it is true or even plausible. I think that we are suffering from that in the United States, in particular, with a proliferation of "new" theories of law, some of which are new, but none of which, as far as I can see, are true or even illuminating; some are slightly ridiculous, even. This is always a risk in a discipline which is largely immune to empirical evidence and which is so dependent on the intuitions of its practitioners and their social and professional status.

[1] The situation is, right now, less bad in Britain, although with John Gardner's untimely death, the retirement of Leslie Green, and the fact that the current "Professor of Jurisprudence" (Gardner's successor) does not work in jurisprudence, there are reasons to worry.

[2] For some revisions to my view, see Langlinais, Leiter 2016.

I want to comment, in particular, on Scott Shapiro's so-called "planning theory of law" (Shapiro 2011), because I think it is a particularly unfortunate case, since he did present himself as trying to continue in the tradition of legal positivism associated with Hart, even though he abandoned it in several crucial respects. Some of what I have to say about this is discussed in more detail in a paper that you can get online at SSRN, called "Critical Remarks on Shapiro's Legality and the 'Grounding Turn' in Recent Jurisprudence" (Leiter 2020). I'm not going to go over everything I said there. I just want to highlight a couple things that seem to be a real move backwards in the field.

Let's start with the most obvious problem, which is that the whole idea that you can have a theory of law based on the idea of people making *plans* shows that Shapiro has already forgotten something that I thought we had all learned from H.L.A. Hart, which is that law can result from the unintentional activities and practices of officials in a legal system. Some law does result from plans (e.g., legal systems with written constitutions) but a great deal of it does not. And this was in fact one of Hart's important insights, yet that is already off the table in Shapiro's account.

Shapiro has also popularized the idea that Hart committed a "category mistake" by allegedly equating rules with practices, since rules are abstract objects, while social practices are concrete activities. This is the weakest objection to H.L.A. Hart I have ever heard from a serious person.[3] Hart did not in fact equate rules and practices. Hart offered a behavioral analysis of what it is to "accept a rule from an internal point of view";[4] Hart's analysis concerns *accepting a rule,* the latter being a concrete practice, not an abstract object. This is explicit in *The Concept of Law,* where he says he is answering the question, "What is the acceptance of a rule?" (Hart 2012, 55):

> What is necessary is that there should be a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expressions in the normative terminology of "ought", "must", and "should", "right" and "wrong." (Hart 2012, 57).

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[3] There are far worse objections from unserious people out there, needless to say.

[4] This way of formulating the point I owe to Kevin Toh.

Hart here describes the behavioral evidence that people accept a rule from an internal point of view; he does not offer any analysis of what a "rule" is here, or elsewhere ("rule" functions as a kind of theoretical primitive in his account of law). Shapiro's "category mistake" objection to Hart is – to, once again, quote Les Green – "categorically mistaken."[5]

Another mistake Shapiro makes is he claims that in order to know what the law is in a particular case – and I quote him now – "it is not enough to know who has authority within the jurisdiction, which texts they have produced, approved and how to interpret it" (Shapiro 2011, 25). It is mysterious, however, how it could not be enough to know what the law is if you know who has authority within the jurisdiction, which texts they produced, and how to interpret them. Shapiro gives this example: "if it is against the law to jaywalk in New York City, then this legal fact obtains in virtue of the fact that, say, the city council voted to approve a bill that set out in writing that jaywalking is prohibited within the city and the fact that they mayor signed this bill" (Shapiro 2011, 26). From these banal facts (which is all a lawyer or citizen would need to know), he proceeds to ask, "What facts might we appeal to in order to establish the authoritative status of fundamental laws such as the Constitution?" (Shapiro 2011, 27).[6] Why do we need to know the answer to that question, if we already know that the Constitution "has authority within the jurisdiction...and how to interpret" it? That is, after all, exactly what Shapiro earlier said (Shapiro 2011, 25) we were entitled to assume. So Shapiro's question seems a non-sequitur.

Part of what is going on here, I suspect, is that Shapiro got the Dworkinian "bug", which has always been anathema to legal positivism – the "bug" being that judicial decision actually requires you to have a general or foundational view about the nature of law. For positivists, however, "what the law is" is one thing, and "what judges ought to do" is another. Legal positivism is a theory about which norms are legally valid, not a theory of judicial decision: law exists primarily outside the courts, one of Hart's key realistic insights into modern law (see Leiter 2021).

[5] There is an interesting question about the social epistemology of academia here. Every expert in legal philosophy knows that the "category mistake" objection to Hart is mistaken, but the *jejune* do not, even the *jejune* with jobs teaching law. Fortunately, mistakes by legal philosophers are not as important as mistakes by doctors: on the "why does it matter?" scorecard, mistakes by those doing general jurisprudence do not kill anyone (contrary to Lon Fuller).

[6] As Tom Adams reminds me, this also sounds like the arch anti-positivist Dworkin in the early parts of *Law's Empire* (1986), a point to which I return in the text.

I've mentioned some particular theses that Shapiro has advanced in his book that represent a step backwards in general jurisprudence, though I worry the real damage that his book has done is not so much the particular false claims that it has made – I think a lot of people are by now aware of these mistakes – it is rather that it popularized a strange and unproductive way of framing the problems in general jurisprudence, namely, in terms of metaphysical grounding relations, which is, as it were, the current fad in analytic philosophy. Analytic philosophy, as many of you may know, is a degenerating research program in something like Lakatos's sense: there is no agreement on its methods, on its problems, on whether the problems have solutions, and so on. As a result, the research program of self-identified analytic philosophers lurches from one intellectual fad to another – the current one being metaphysical grounding.[7]

What is puzzling about this "grounding" turn in general jurisprudence is that it makes it sound like the real problem in philosophy of law is to find law's place in what you might call a metaphysical layer cake: one layer of the cake is supposed to be the "law facts", and then there are these other layers: social facts, moral facts, psychological facts, and so on–all kinds of facts are somewhere in this cake! And the problem is to figure out how the different layers are all connected to each other. It would be as if philosophers of art thought the central problem about the nature of art was the relationship between art facts and social facts, psychological facts, and physical facts; or if philosophers of science thought the central problem about the nature of science was the relationship between "science facts", and all the other kinds of facts. But no one concerned with understanding the nature of art or science has fallen prey to such pointless metaphysical speculation. Philosophers of science, for example, have suggested that what distinguishes science from non-science is, *inter alia*, verifiability, or falsifiability, and so on. The connections between metaphysical strata are irrelevant.

The "grounding turn" that Shapiro has popularized arises textually, it seems, from the fact that Joseph Raz sometimes would say things like, "the positivist social thesis is that what is law and what is not is a matter of social fact", which he himself called a "crude formulation" (Raz 1979, 37). Shapiro takes the crude formulation quite literally. Raz's formulation wasn't meant to be an invitation to general metaphysics, it was rather a shorthand for the complex of ideas that we in fact got from Hart. These are ideas like: law is

[7] Those outside philosophy, or who don't know much intellectual history, probably think "naturalism" is a fad too. If so, it is the "fad" of the entire modern era since the scientific revolution. It is also a "fad" at a much higher level, one that many of those committed to "grounding" talk also accept.

conventional, not transcendent; which norms are legally valid in a particular society are those treated as such in the purely conventional practice of officials in a legal system when they converge on certain criteria of legal validity and accept them from an internal point of view, and so on.

Is Hartian positivism correct about law in the preceding respects? That is the real issue, and it is lost when you frame the question of general jurisprudence as a question about metaphysical grounding relations. I also – just as an aside – worry that we are setting an impossible and thus pointless task if we treat this as a metaphysical grounding issue. I would have thought we learned from Saul Kripke's meaning skepticism (we cannot specify the facts in virtue of which some sentence – or rule – has a particular meaning), and from Nelson Goodman's new paradox of induction (we cannot specify the facts that will allow us to reliably project any particular predicate into the future) that we have no good metaphysical account, in any domain, of how particular facts determine particular contents. These kinds of famous examples in philosophy would suggest that "how facts make law" – to use Mark Greenberg's phrase (2004), and Greenberg was the main influence on Shapiro's framing of this – isn't going to be a successful undertaking. If that is right (and nothing in the literature so far leads me to think otherwise), then this is a serious obstacle to progress in legal philosophy, in the sense that it has derailed inquiry in an unproductive way–although it has appealed, unsurprisingly, to people who have recently gotten Ph.D.s in analytical philosophy departments.

So with that let me turn to what I think is the main problem in the other sense (i.e., what issues we really need to address), although it is closely related to what I have just said. I think what we need in Anglophone jurisprudence is something like a "Back to Hart" movement. In mid-19th century Germany, they had a Back-to-Kant movement, after they got through with Fichte and Hegel, which was an ordeal. The German "Back to Kant" movement got a lot of momentum from developments in physiology; Herman von Helmholtz, in particular, thought that the physiology of the human sensory apparatus vindicated Kant's transcendental idealism, by demonstrating the dependence of our cognition of the world on the peculiar features of the human sensory apparatus. Hart has no Helmholtz to come to his defense,[8] although we may at least note on Hart's behalf that most social scientific research into law continues to rely on what are recognizable positivist assumptions (see Leiter 2007, 188–90).

[8] This kind of "defense" of Kant is vexed for many reasons, but those need not concern us here.

Getting "Back to Hart" requires more than simply avoiding derailment by mistakes like Shapiro's. Rather, I think a better understanding of Hart's contributions are particularly important for our current debates. Tom Adams (Adams 2021) at Oxford has shown us, for example, that the common attribution of a "practice theory of rules" to Hart is a mistake – a mistake not unrelated to the one Shapiro commits, noted earlier. This is a mistake that some well-known figures, including Raz, have helped propagate. It is astounding that it has taken a half-century to set the record straight, but it is important to have done so, since the alleged "practice theory of rules" also derailed an earlier generation into many unproductive debates about Hart's theory. Perhaps there is an analysis of rules that will be of jurisprudential interest, but Hart treated them as theoretical primitives, which was fine for his purposes.

I want to focus, however, on two other issues. One is the question of theoretical disagreements. Although the Hart-Dworkin debate is a kind of zombie, the more recent version of it, the problem of theoretical disagreements, does actually raise an interesting question for positivist theories of law. Now, Dworkin himself made the claim in *Law's Empire* (1986) that because positivism could not explain the face value of theoretical disagreements, disagreements about the criteria legal validity, this shows that positivism fails as a theory of law – and that was an obvious non sequitur. Theoretical disagreements are one kind of phenomenon that we associate with legal systems, but they aren't the only one that a theory of law is supposed to explain. As I've argued (Leiter 2009), positivists can give an explanation of theoretical disagreement, though it is one that explains them away.[9] The fact that you explain something away is not, without a lot more argument, an objection to the explanation. My view is that where we have genuine theoretical disagreements – and I think that they are uncommon, except in the higher appellate courts – the participants are making a certain kind of very abstract error about the nature of law. If there really is no fact of the matter about what criteria the officials converge upon and accept from an internal point of view, then there is simply no fact the matter what the criteria of legal validity are. Those who say otherwise are simply making a mistake – a totally understandable mistake, since judges can be perfectly competent at what they are doing without having a worked-out theory about the nature of law. As I said earlier, what the law is, and what judges ought to do, are two separate questions.

[9] I have also argued that this was Hart's view, against scholars like Kevin Toh. See Leiter 2019; and for Toh's view see Toh 2019.

There's another possibility here, however, an alternative to my error-theoretic interpretation of theoretical disagreements, and this has been less explored: Torben Spaak in his paper in *The Cambridge Companion to Legal Positivism* (Spaak 2021) touches on this possibility. I have a Ph.D. student here at the University of Chicago, Aaron Graham, who is working on this, namely, the idea that it is a mistake to grant Dworkin that a rule of recognition has to include among the criteria of legal validity particular theses about how the sources of law are to be interpreted as applied. Maybe a rule of recognition only specifies the valid sources of law and nothing more? And so even in *Riggs v. Palmer* (Dworkin's favorite case) the judges agree on the sources of law and they're disagreeing on how to apply them in this particular case. The difficulty that confronts this approach – and I raised this with Torben a while ago at a conference preceding *The Cambridge Companion to Legal Positivism* – is that the rule of recognition is supposed to fulfill an epistemic function, i.e., it is supposed to enable us to identify which norms are legally valid norms. And so it seems we have to know a little bit more than just what the sources of law are. We have to know, as it where, what norms the sources actually enact, which might seem to drag us into questions of how the sources are to be interpreted, unless we can, as it were, distinguish between the sorts of interpretive disputes that form the bases for the theoretical disagreements Dworkin talks about and the way in which the sources of law have meaning prior to that kind of interpretive dispute. This is something like Mr. Graham's strategy, and he may well be right about this, and also that this is actually consistent with what Hart says about the rule of recognition. So getting clearer about Hart's views may reveal a different way of responding to the problem of theoretical disagreement.

The second issue where I think we could benefit from further investigation in our effort to get back to Hart concerns how he conceives of the internal point of view, the idea so distinctive and crucial to his theory of law. Is it enough simply to "talk the talk" and "walk the walk" to adopt an internal point of view, i.e., is it enough to say the right things and do the right things? And if so, does that mean that someone can take the internal point of view while only doing the job for the money, as it were, which some recent writers suggest is possible.

Now it seems to me that this recent debate is taking advantage of the fact that Hart himself was in the grips of something like Gilbert Ryle's view about what it is to be in a mental state (e.g., to have a certain "attitude"). Gilbert Ryle wrote *The Concept of Mind* in 1949, which is why H.L.A. Hart, misleadingly, called his 1961 book *The Concept of Law*, since that's what Oxford philosophers did: offer an analysis of a "concept." But I think the Ryle influence goes a little deeper and requires more examination. Ryle claimed

that to be in a mental state is just equivalent to manifesting certain behaviors, or having the disposition to engage in certain kinds of behavior.[10] And I think that Hart takes this over in the sense that he wants to characterize the internal point of view in purely behavioral terms, i.e. people take the "internal point of view" only insofar as they do and say certain things: they say you must use these criteria of legal validity, they criticize those who deviate from those criteria, and so on. And, of course, Hart goes out of his way to criticize the suggestion he associates with Alf Ross, that adopting the internal point of view is a matter of having a certain feeling (Hart 2012, 88). But one of the reasons he is doing that is because he's operating with Ryle's assumption that it suffices for the ascription of an internal attitude to an agent simply to identify the behavior that the agent manifests. Ross, to his credit, was less hostile to appeal to *actual mental states* than behaviorists like Hart, an ironic fact given the effect Hart's critique had on the reception of Ross in Anglophone legal philosophy.

The problem now is very few of us are behaviorists about the mental,[11] and I think this leads contemporary readers to object that since Hart only says you have to "talk the talk" and "walk the walk" to have the internal point of view, one could reply: "wait a minute, we know that people can say things and do things but not really mean it!" So judges who accept the internal point of view in Hart's behavioral sense might, after all, just be doing it for the money! In making such an objection, however, we are appealing to the very un-Rylean distinction between what the agent *really believes in their private mental theater* and what the agent's actions and talk are presenting to the world. But this distinction is not one Hart, following Ryle, thinks is available. If that is right, then we should be skeptical of the idea that a judge could in fact adopt "the internal point of view" simply by "talking the talk" and "walking the walk," but not really believe any of it, i.e. not feel – there's that word "feel" – that the rule of recognition is in some sense obligatory, or something like obligatory. (I say "something like obligatory", because obligation for Hart is also just analyzed in the terms of the use of certain language and certain behavior (Hart 2012, 82–91).) The evidence from "wicked" legal regimes, in particular, strongly suggests that the judges *really do believe* that what they are doing is right, good, worthy, obligatory. As Pauer-Studer (2020, 205) reminds us, the notorious Nazi judge Roland Freisler stated that, "There can be no divide between a requirement of law

[10] More precisely, Ryle spoke about sentences about mental states being equivalent in meaning to sentences about behavioral dispositions. I give this a metaphysical, rather than semantic, gloss in the text.

[11] Some have even denied Ryle was even a behaviorist about the mental, but that revisionary view need not concern us.

and a requirement of morality. For requirements of law are requirements of decency...". Other jurists in the Nazi era echoed that view: "law can only mean the lived morality of decency of a *Volk* [a people]" (Pauer-Studer 2020, 206). Obviously judges who think of law that way are adopting the "internal point of view" in a morally demanding sense. If this were just pretense, it is surprising how long they persisted in the pretense even in the face of defeat.

There is, of course, a tendency in Anglophone jurisprudence to focus on foreigners (e.g., Germany in the 1930s, the Soviet Union in the 1930s, East Germany in the 1950s and 1960s, South Africa in the 1960s and 1970s) for examples of "wicked" legal systems, but the truth is that human beings far removed from our times and parochial prejudices will perceive the American legal system as "wicked" too, albeit not generally on the Nazi scale. Take only the most obvious example: racial apartheid was legally sanctioned for a century in the United States after the end of chattel slavery;[12] even after its end, remedies for its harm were circumscribed or eliminated by the courts; laws continue to be enacted meant to deny the vote to the descendants of the victims of apartheid; and on and on. But American laws permitting the wide availability of firearms, the intrusion of religion into most aspects of civil society, the dominance of money in elections, the spreading of racial and ethnic hatred: all these already seem, at best, morally peculiar and, at worst, morally depraved, to many outside the United States, and to an increasing number inside it. Yet I can attest, from first-hand knowledge, that judges and other important legal actors in the American system take the "internal point of view" and are not simply enforcing and upholding these laws "for the money" or for other merely prudential reasons. They think they are acting rightly, promoting justice, doing good.

So these are a couple of suggestions where getting "Back to Hart" might help us deal with some important problems in legal philosophy: the question of theoretical disagreements and the content of the rule of recognition; and the nature of the internal point of view. Our answers to these problems may not be Hart's, of course; in the case of the internal point of view, most obviously, we have good reason to reject behaviorism about the mental. But having done that, we should still ask what account of that point of view is really consistent with the evidence about legal systems. And if there is a positivist alternative to the error-theoretic interpretation of theoretical disagreements, we will want to know how it fits with the rest of Hart's theoretical apparatus for understanding law.

[12] Wage slavery proceeds apace everywhere, of course.

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