MICHAEL STOKES

FORMALISM, REALISM, AND THE CONCEPT OF LAW

INTRODUCTION

The essence of positivism is the thesis that all law has its source in facts about the behaviour of people in society rather than in moral value.[1] This claim entails that if we could examine all the relevant behaviour of the members of a community we would be able to discover all the laws of the community, because inability to do this would demonstrate that there are some laws that do not have their source in social behaviour. Secondly, it entails that the laws discovered in this way must, at least in some cases, bind judges and provide conclusive answers to issues which come before the courts. If these laws never provide conclusive answers but must always be supplemented by other standards, we cannot claim that they are the whole of the law. Instead, we must concede that whatever standards and values are used to supplement these laws are also law or we must accept that these laws are not law but are merely, along with the standards used to supplement them, a source of law. Either alternative is inconsistent with the thesis that law has its source in social behaviour.

The judge occupies a central position in modern positivism. The positivism of Austin and Bentham viewed the judge as an unproblematical extension of the sovereign. In their theories, law was the command of the sovereign backed up by sanctions for disobedience. The role of the judge was to apply the law and order sanctions when required. They devoted little attention to considering why, if at all, the judge was bound to enforce the sovereign's orders. The realists brought this issue to the forefront of

[1] Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), pp. 37–40.

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Jurisprudence by arguing that judges are not bound by what are normally thought of as laws, such as statutes or precedents, but are free to choose between them or reject them.

By focussing on the role of the judge, the realists highlighted inadequacies in the traditional positivist account of obligation. The traditional account claimed that we had an obligation if we were subject to an order and were likely to be punished if we disobeyed. By focussing on the judge, the realists demonstrated that whether or not this could be accepted as an account of the citizen's obligation to obey the law, it could not be accepted as an account of the judge's obligation to apply the law because it entailed that judges could only have an obligation to apply the law if they were subject to sanctions for a failure to do so. As it was not easy to find the sanctions which impose obligations on the judges, the realists concluded that the judges were not under any obligation to apply the law.

This sceptical conclusion ignores the way in which laws are used as binding standards by judges and officials as well as by citizens. It also makes it impossible to distinguish legal from other moral and political standards. Hence realism makes it clear that a key task for jurisprudence is to explain how laws are binding on judges. After realism, positivism had to produce a theory of legal obligation which showed how judges who were not subject to sanctions could be bound by the law and also had to show that this obligation was consistent with the thesis that the law is constituted by social behaviour. This article shall argue that a positivism such as that of Hart, based on the tenet that the law consists of social behaviour alone, cannot produce a theory of obligation on which to base that claim. It can only show that judges act as if they have such a duty. Hence it can only answer the realist claim that judges are not bound by the law if it can be combined with a prescriptive theory which shows that judges do have such a duty.

The fundamental positivist claim that law has its source in social behaviour rather than moral value places constraints on the type of theory that could be used to show that judges are bound to apply

the law. The theory must impose a duty to apply the law, regardless of its content, reasonableness, or justice. The theory cannot limit the judges' obligation to apply the law by reference to standards such as those of reasonableness and justice. If the theory limits the judges' obligations by reference to such standards it cannot be reconciled with the positivist claim that al the law has its source in social facts because it requires that values which do not have such a source be taken into account in determining the content of the law.

If positivism is combined with a political theory of judicial duty to provide a justification for the claim that the judge is bound to apply the law, it commits positivism to abandoning the search for a theory that shows how binding obligations can have their source in social behaviour. However, that can only strengthen positivism because no positivist has been able to produce such a theory. Besides, the search for such a theory can be abandoned without giving up the claim that all law and hence the content of all legal obligations has its source in social behaviour. It does lead to the paradox that the judges' obligation to apply the law is not imposed by the law itself. However, that paradox is typical of systems of rules which are seen as self-contained and separate from background moral and other standards, such as the rules of a game. For example, nothing in the laws of cricket makes them binding on the umpires or the players. Instead, we must look outside the rules to general understandings about the point of games and about fairness to discover why they are binding. Similarly, the positivist must look outside the law to political theory to explain why the law is binding on judges.

This article uses Hart's theory to argue that formalism is a theory of judicial obligation which is more consistent with positivism than other theories and is positivism's best answer to the realist claim that judges are not bound to apply the law.[2] The article then

[2] In considering the relationship between positivism and formalism and in showing how formalism can be combined with positivism to answer the realist claim, I shall use the theory of Professor Hart in *The Concept*

attempts to draw some conclusions about the assumptions on which positivism is constructed from the close relationship between positivism and formalism. Part I of this article considers the need for positivism to be coupled with a theory of judicial duty and the constraints which are imposed on such a theory by the thesis that law consists of social behaviour. Part II deals with formalism as a theory of judicial and official obligation and suggests that formalism is consistent with positivism in that it meets all of the constraints imposed by the thesis that law consists of social behaviour. Part III attempts to show the extent to which positivism is built on formalist premises by considering the parallels between Hart's theory and formalism. Part IV considers whether other theories of judicial obligation can be combined with positivism and concludes that formalism offers the only viable defence of Hart and similar positivist theories against realism. The conclusion attempts to show why *The Concept of Law* and any theory which sees law as a system of

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of Law as a model positivist theory. I have chosen his theory rather than the more recent and in some ways more refined writings of Raz, because Hart's writings attempt to deal systematically with the problems of positivism, whereas those of Raz deal to a great extent with problems which face all theories of norms, both positivist and non-positivist. In particular, Hart's theory is useful because it attempts to reconcile the positivist claim that all laws have their source in social fact with the view that laws are standards which people use to guide their behaviour by developing a theory of rules which shows that rules are social practices; *The Concept*, 54–56. Although that attempt fails to show how such rules can bind for reasons dealt with below, it has, unlike Raz's theory of rules as reasons, the positivist virtue of attempting to show how standards can have their source in social behaviour. Without such an account, positivism is reduced to a dogmatic assertion that the law has its source in such behaviour. Besides, the failure to show how rules which have their source in social behaviour can impose binding obligations is instructive in itself, in that it shows that the social thesis must be limited to the thesis that social behaviour is the source of the content of the law but is not the source of the obligations which the law imposes. In doing that it demonstrates that positivism is not a complete theory of law but must be supplemented by a prescriptive theory of judicial responsibility.

rules which have their source in social behaviour is committed to a formalist theory of judicial duty by placing these theories in a broader philosophical context, and in particular by attempting to show that their concept of law as a system of rules is similar to many formalist theories in that it flows from the view that law is a voluntary cooperative enterprise.

I. POSITIVISM, REALISM, AND THE SCOPE OF JUDICIAL DUTY

To answer the realist claim that judges are not bound by the law, positivists need to develop a theory of legal obligation which shows how judges and citizens can be bound by the law although they are not subject to sanctions for refusing to apply it. Positivists such as Hart and Raz have been much concerned with this issue. Both have argued that legal standards are used by citizens as a guide to their behaviour and bind judges at least in some cases.[3] Both have sought to explain the nature of this obligation in a way which is consistent with positivism. This has forced them to adopt a theory radically different from those of earlier positivists such as Austin.

The earlier theories situated the source of legal obligation in the behaviour of others rather than in the behaviour of the person who was subject to the obligation. Hence they were able to explain the fact that obligations make behaviour in some way non-optional by arguing that obligations are imposed by force by one person on another. For example, Austin argued that the legal obligations of members of the public were imposed by the commands of the sovereign backed up by the threat of punishment for disobedience.[4]

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[3] This claim could be said to be the theme of Hart's *The Concept*. Raz's argument that rules are reasons for action is related to the same issue; see *Practical Reason and Norms* (London: Hutchinson, 1975), ch. 2, "Mandatory Norms".

[4] *The Province of Jurisprudence Determined*, ed. H. L. A. Hart (London: Wiedenfeld & Nicolson, 1954), Lecture 1.

Because judges are not subject to sanctions in any obvious way, the modern positivists who sought to explain how the law binds judges could not base their theory of obligation on the view that obligations are imposed on one person by another. Instead, at least in their analysis of the obligations of judges, they did not seek to show that obligations arise from the behaviour of others but that they have their origins in the behaviour of the judges themselves. That has required them to develop a theory which shows how the behaviour of a group or a society can generate standards that can bind its members. The most sophisticated attempt to do this remains Hart's theory of a rule, which attempts to show how social behaviour can create standards which the participants use to guide their behaviour.[5]

According to Hart, rules are social practices. They exist when members of a society or group not only behave in the same way as a rule but accept that they should behave in that way. Deviations from that behaviour are generally regarded as faults which are open to criticism and threatened deviations are likely to be met with demands for conformity. Not only are deviations criticised, but a deviation is considered as a good reason for the criticism, so that most of the group, including the deviant himself, are likely to regard the criticism as justified.[6]

This theory has been criticised by Dworkin and Raz on a number of grounds, including the grounds that rules may exist even if they are not accepted by the community and that widespread belief that there is a rule does not entail that the belief is correct, or justify the rule.[7] Although these criticisms are valid, the article uses Hart's thesis that rules are social practices as an example of a theory which attempts to explain how the behaviour of a group can generate standards which bind its members because the article's concern is not with the adequacy of this thesis

[5] *The Concept*, pp. 54–55.

[6] Id.

[7] Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), pp. 48–58, and Raz, *Practical Reason and Norms*, pp. 49–58.

as an account of rules but with the implications of such a thesis for judicial duty.[8]

It is difficult to develop a theory which is based on the positivist tenet that legal rules have their source in social behaviour and which shows how such rules can bind judges without subjecting them to sanctions. The work of Raz illustrates the difficulties. Being a positivist, he accepts that the law has its source in social behaviour.[9] He accepts Hart's insight that a theory which claims that persons can be subject to obligations which have their source in social behaviour without being subject to sanctions must be a theory which claims that a group or society can, by its behaviour, generate standards which bind itself as well as others. Recognising the central role of judges, he accepts that the behaviour of judges plays a crucial role in generating legal standards in that their practice of using tests to identify the law is crucial in defining the content of those tests and hence in defining the law itself.[10] Finally, he argues that judges are bound to apply these tests for law.[11] He has not, however, developed a theory which shows how tests for law which have their source in social behaviour can bind judges so that we can say that they are bound rather than that they accept or believe that they are bound.

He is aware of the problem. He rejects Hart's social rule theory because social practices of the kind which Hart claims constitute rules are not reasons for action; that is the fact that a social practice

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[8] If the social rule thesis is rejected, it may be very difficult to defend the thesis that law has its source in social behaviour. The core of the criticisms of the social rule thesis referred to in footnote 10 is rules do not consist of social behaviour alone. If that is accepted, it becomes hard to defend the positivist claim that rules of law have their source in social behaviour. In the Conclusion, I shall consider a way of defending the social rule thesis against its critics.

[9] *The Authority of Law*, pp. 37–52.

[10] Raz argues that the creation of courts transforms a set of laws into a legal system; *Practical Reason and Norms*, ch. 4.

[11] *The Authority of Law*, pp. 90–97 and *Practical Reason and Norms*, p. 97.

of the type that Hart claims constitutes a rule exists is not in itself a reason why anyone should comply with the rule.[12] It may, coupled with other facts, such as the fact that those who ignore the practice are likely to be punished or ostracised, provide such a reason. It may also play a role in justifying a rule in that some rules, such as the rule that all drivers should drive on the left hand side of the road, are pointless unless they are consistent with community practice. However, by itself it does not amount to a reason for action. If this is accepted, it follows that the fact that a social rule exists does not impose an obligation on anyone to comply with that rule. Hence, the existence of a social practice among judges in accordance with which they act as if they have an obligation to impose existing rules of law cannot impose an obligation on a judge to apply such rules.

The social practices which Hart equates with rules need to have additional features if they are to be capable of operating as reasons for action and hence of imposing obligations. To be consistent with the thesis that the law consists of social behaviour, those features need to be social behaviour themselves. To show how judges can have an obligation to apply the law, they need to be consistent with Hart's aim of showing that people can impose standards on themselves by means of their own behaviour rather than have those standards imposed on them by the behaviour of others.

It is difficult to see how Hart's social rules could be supplemented by other types of social behaviour so that they are capable of providing reasons for action without departing from the aim of showing that people can impose standards on themselves by their own social behaviour rather than having those standards imposed by others. The first way in which the practices which Hart equates with social rules could be supplemented by other types of social behaviour so that they provide reasons for action would be to require that they must be accompanied by a practice of punishing or imposing sanctions on those who do not comply with the practice. The sanction

[12] *Practical Reason and Norms*, pp. 56–58.

would then provide a reason for complying with the practice so that together they could be said to amount to a rule. If sanctions are interpreted broadly, it could be argued that judges are subject to sanctions such as peer pressure and community expectations which are sufficient to give them reasons for complying with a system of law constituted by social practices of the type which Hart describes.

This solution to the problem cannot be accepted without abandoning Hart's central idea that the law consists of binding standards which are used by judges and officials as guides to behaviour whether or not there are sanctions for non-compliance.[13] However, it may be that it is impossible to show that social behaviour can generate binding standards of that type. If that is the case, positivism may have to abandon the theory that law consists of standards looked on as binding whether or not they are backed up by sanctions for the simpler theory that law binds only to the extent that it is backed up by sanctions. If that simpler view is adopted, positivists will be able to give up the difficult search for a type of social behaviour by which people can bind themselves as well as others to standards because the theory that the law is binding only to the extent that it is backed up by sanctions sees legal obligations as imposed on one person by the behaviour of another.

However, to abandon the view that the law is a set of standards seen as binding in the absence of sanctions is to abandon Hart's account of the way in which the law is used as standards to guide behaviour, an account that appears to offer a much more convincing explanation of the way in which the law is used than does the thesis that the law consists of orders backed up by threats. It would also weaken Hart's position with respect to realism because it would make the judges' obligation to apply the law depend upon contingent factors such as the existence of sanctions such as peer pressure or community expectations. Hart's position would be stronger if he were able to argue that judges have a duty to apply

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[13] *The Concept*, pp. 55–56 and 86–88.

the law even in the absence of sanctions of this type because he would then be able to argue that judges have duties even in legal systems where such sanctions were lacking. Therefore, supplementing Hart's social rules with sanctions in order to enable them to act as reasons for action is not acceptable because it abandons much that is central to Hart's thesis and weakens his case against the realists.

The second way in which social rules could be supplemented to make them reasons for action is to abandon the claim that social practices constitute rules for the weaker claim that social practices may justify rules in the sense that they may provide an argument for the existence of rules.[14] However, as Dworkin has shown, this view entails that rules are not constituted by social behaviour alone, but by social behaviour and arguments about whether the existence of such behaviour imposes obligations.[15] Therefore, it cannot be accepted without abandoning the social thesis.

These problems illustrate the difficulties positivism faces. Modern positivism is committed to the views that legal rules have their source in social fact and that they operate as binding standards even in the absence of sanctions. This entails, in some non-trivial sense, that social facts alone can generate such binding standards. No positivist has been able to show how this occurs or can occur. As a result, positivists who accept that the law binds judges although they may not be subject to sanctions for disobedience have not been able to develop a theory of judicial obligation but have only been able to describe the current practice of judges. Therefore, they have not been able to answer the realist claim that judges are not bound by the law.

The failure of the positivist to answer the realist claim can be illustrated from the work of Professor Hart. According to Hart, a

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[14] Dworkin, *Taking Rights Seriously*, ch. 3, elaborates this idea and suggests that it is the proper relationship between social practices and rules.
[15] Id.

social practice which generates a rule, the rule of recognition, provides the key to understanding the obligation of the judges to apply the law.[16] The rule of recognition is a shared test used by judges and other officials for identifying the rules of law which are binding on them and for criticising other judges and officials who fail to apply the standards which it identifies.[17]

Hart seeks to use this shared standard to answer the realists by showing how judges, at least in some cases, are bound by clear rules of law. In these cases, judges are able to use the rule of recognition to identify clear rules which provide a clear answer. If the judges do not apply these rules, they depart from their shared standard and would be seen both by themselves and by other judges as having failed to carry out their obligations under the law.[18] Hart is able to use these cases to point out that the realist claim that judges are always free to refuse to apply legal rules is not consistent with the normal practice of the courts which act as if they are bound to apply the law.[19]

It is apparent that this is not an answer to the realist. It does make the important point that, as a description of judicial behaviour, the realist account does not accord with reality. However, realism does not merely offer a description of judicial behaviour. It also seeks to guide judges in the way in which they should carry out their duties. It claims that judges should not act as if they are under a duty to apply the rules because they always have a choice to depart from them to a greater or lesser extent. Realists urge judges to use that freedom constructively to do justice rather than to apply inappropriate rules in a mechanical fashion. It is no answer to this claim to point out that judges do act as if they were bound by the rules because the realist may not deny that that is the existing

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16 *The Concept*, pp. 92–107.

17 Id. Raz basically accepts the rule of recognition with some modifications which are not relevant for my purposes; *The Authority of Law*, pp. 91–97.

18 *The Concept*, pp. 140–43.

19 Ibid., pp. 132–37.

practice. Instead, he would seek to persuade judges to abandon that practice and adopt a different approach.

Hence, Hart's theory is no answer to the realist because it does not show that judges have a duty to apply the law. To show that judges have a duty to apply the law, Hart must show that the judges are bound by the rule of recognition. It may seem enough to show that judges accept the rule of recognition as the appropriate test for law for any reason whatever, because, whether they are bound by it or not, if they accept the rule of recognition it will require them to apply the law it identifies.[20] However, this argument cannot be accepted. Realists do not deny that judges accept shared tests for identifying law or that in many cases, judges, for strategic or prudential reasons, apply the law that the tests identify. They may even concede that in most cases judges should apply the law or have good reason for doing so. What the realist denies is that the judges are bound to apply the law in the sense that they can be said to be in breach of their duties if they refuse to do so. Instead, the realist argues that the judge is free to ignore the tests for law and depart from the rules in appropriate cases. Realists may concede that in most cases judges should and do accept the rule of recognition and should and do apply the rules for moral, strategic or prudential reasons consistently with this claim.[21] Hence, to defeat the realist claim, it is necessary to show that not only do judges have good reason to apply the rule of recognition but that they are bound to apply it.

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[20] This is the position of both Hart and Raz; see Hart, *The Concept*, pp. 198–99 and Raz, *The Authority of Law*, pp. 154–55 and *Practical Reason and Norms*, pp. 146–47.

[21] In rejecting the theory that laws bind because they are backed up by the threat of force, both Hart and Raz recognise that the fact that people may have prudential reasons for following the law does not entail that they have an obligation to obey it; Hart, *The Concept*, pp. 80–83 and Raz, *Practical Reason and Norms*, pp. 161–62. To be consistent, they would have to accept that the fact judges may have strategic or prudential reasons for applying the rule of recognition does not mean that they are under any obligation to do so.

Although Hart is committed to the view that judges are under an obligation to apply the rules which the rule of recognition identifies to the exclusion of other considerations, his commitment to the thesis that law has its source in social practice commits him to the view that the duty of the judges to apply the law is not a legal duty and indeed is not a part of the law itself. For Hart the duty of the judge cannot be part of the law because a duty is a reason for action and social practices of the type he claims constitute the law cannot provide reasons for action.[22] Therefore, he is forced to distinguish between what he categorises as law and the reasons which judges and officials may have for applying the law.

Hart is committed to the distinction and considers it a virtue of his theory. His rule of recognition is designed to identify the rules of law and to distinguish them from political and moral considerations of the type that could provide good reasons for applying the law.[23] It separates rules of law from political and moral considerations not by reference to their content but by reference to the way in which they originated. Tests for law such as a rule of recognition either identify an authoritative code, such as the Roman Twelve Tables, or identify those officials and institutions who at various times have had law-making power. The test is used in any particular case by considering whether the rule in question is in the authoritative code or has been enacted into the law by an appropriate official or institution.[24] As codes originate in legislation, Hart's tests for law entail that all law originates in legislation or some other law-creating act. Such legislation cannot embody the reasons which judges may have for applying the law because no one can enact reasons which will motivate another person to apply particular rules.[25]

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[22] See text accompanying notes 12–15 above.

[23] *The Concept*, pp. 198–207.

[24] Ibid., p. 92.

[25] The early positivists recognized this and accordingly argued that to be effective the law had to provide a motive for obedience by attaching a sanction to every rule.

As Hart's theory excludes the reasons which judges and officials may have for applying the law from the law, it may seem that those reasons can be ignored as long as they commit the judge to apply the rule of recognition. However, they cannot be ignored because they have the potential to undermine the thesis that the law consists of a set of rules which may be identified by a test for law constituted by social behaviour. They have this potential because the reasons a judge has for applying the rules may be relevant to that judge's reasoning in particular cases. If they are relevant and judges use them as well as the rules in deciding cases, it is difficult to deny that they are as much a part of the law as the rules. If that is the case, it is impossible to maintain the thesis that the law consists solely of rules identified by a test such as the rule of recognition because, as argued above, these reasons cannot be identified by such a test. It is also impossible to maintain the thesis that the law is constituted by social practices because social practices cannot be reasons.

It may be objected that the reasons the judges have for applying the law do not necessarily affect their decisions. As both Hart and Raz point out, judges may accept the rule of recognition as the appropriate test for law for any number of reasons, including moral commitment to the system or self-interest.[26] It does not follow that these reasons will necessarily affect their decisions. This point may be accepted without weakening the argument. In their discussion, Hart and Raz were concerned to make the point that judges could accept the law for any number of motives, both good and bad, and that, once they had accepted the law, they were equally bound to apply it and equally able to adopt the internal point of view towards it. The point under discussion is different in that it is not concerned with the motives which the judges may have for accepting the rule of recognition but the justifications which exist for applying it or refusing to apply it in particular cases. The

[26] Hart, *The Concept*, pp. 198–99; Raz, *Practical Reason and Norms*, pp. 147–48.

concept of motive is completely descriptive in that a person's motives are the reasons which that person has as a matter of fact for his or her actions, whether or not those reasons are good or bad. On the other hand, the concept of justification is evaluative in that justifications for an action are good reasons for that action. The difference may be illustrated by considering the example of making a promise. A person may be motivated to make a promise for numerous reasons including altruism or self interest. However, once the promise is made, the motives which he or she had for making it are irrelevant in determining the scope of his or her obligations to perform it. That will be determined by the justification for holding people to promises.

It may be accepted that once a person accepts a commitment to apply the law, for example, by accepting the office of judge, his or her motives for accepting it may be ignored because most judges would concede that their motives for accepting the office of judge should not affect the way in which they carry out their judicial duties. However, even a sociologist intent on merely describing the practices of judges cannot ignore the justification for applying the law that the judges think that they have because the justification which a judge believes that he or she has for applying the law may enter into his or her reasoning in particular cases and affect the decisions which he or she makes. For example, a judge who believes that the duty of a judge is to apply the rules of law identified by a test for law such as the rule of recognition except in those cases in which they would lead to manifest injustice, is likely to come to different decisions in some cases from a judge who believes that the duty of a judge is to apply the rules, regardless of the injustice to which that leads.

A shared social practice such as that which Hart claims to constitute a legal system could not exist if the judges have different justifications for applying the rules identified by a test for law and if those justifications affect their use of the rules in particular cases. For the practice which Hart claims constitutes the law goes beyond using a shared test for identifying rules of law. Such tests, such as the rule that whatever the Parliament enacts is law, can be shared

regardless of the different justifications people may offer for them as long as they are merely used to identify the rules. These tests do not depend for their effectiveness on the justification the judges have for using them because they can be used by judges who have very different theories of judicial duty, for example by judges who consider that the rules are just one factor to be taken into account in their decisions as well as by judges who believe that they should not take other matters into account if the rules can provide an answer.

However, the practice Hart envisages is not limited to that of sharing a test for identifying rules of law but includes using these rules to the exclusion of other considerations to provide answers in at least some cases. Unless these rules can be used to decide what the law requires in some cases without being supplemented by other standards, there is no basis for the claim that all law can be identified by the rule of recognition. If other standards have to be used along with the rules to reach decisions about what the law requires in all cases, those other standards have equal claim to be considered as law along with the rules. As they cannot be identified by the rule of recognition, the thesis that all law can be identified by a rule of recognition cannot be accepted. If the thesis that all law can be identified by the rule of recognition cannot be accepted, the theory that law consists of social practices must also be abandoned because the rule of recognition is a social practice and is designed to distinguish the law, which is constituted by social practices, from other standards which are not.

It can be seen that the theses that all rules of law can be identified by a rule of recognition and that the law is constituted by social practices depend upon a practice in which these rules alone determine the law applicable to particular cases. For such a practice to determine what the law is in at least some cases, it must not only include a shared test for identifying rules of law but also a shared practice of adjudication in which those rules alone are used to decide the law in some cases and other considerations are excluded as irrelevant.

A shared practice of adjudication in which rules identified by

a shared test are used to determine what the law is in particular cases cannot exist unless the judges use the rules in the same way to determine the law in the cases which come before them. If the judges differ in the ways in which they use the rules, we may be able to say that as a rule they use the same rules. However, that is not sufficient to constitute a practice of the type envisaged by Hart. The practice as seen by Hart is a critical standard which the judges use to evaluate the way in which they and other judges decide cases.[27]

A practice of adjudication constituted by social behaviour cannot exist as a critical standard unless there is agreement about how the rules are to be used to decide cases. In particular, there needs to be agreement about when it is permitted to depart from the rules. Without agreement about the cases in which it is proper to depart from the rules, it is impossible to use the practice as a shared critical standard because it is impossible to distinguish unauthorised lapses from the practice, which ought to be criticised, from authorised departures which should not be criticised. Therefore, unless there is some agreement with respect to which it is proper to depart from a practice such as the rule of recognition, that practice cannot be described as a shared, binding standard.

Disagreement about when it is proper to depart from a rule shows that the content of that rule is in dispute. If the rule of recognition is constituted by shared practices, widespread disagreement about its content shows conclusively that there is no shared practice and hence no rule.[28] Social behaviour could not constitute a rule unless it amounts to a shared practice. Facts about social behaviour such as the fact that members of the group often appeal to a standard in order to justify criticising the behaviour of others will be evidence that many of the group believe that the behaviour in question is governed by rules. However, in the absence of agreement as to the content of that standard, it is impossible to say

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[27] *The Concept*, pp. 54–56.

[28] See Dworkin, *Taking Rights Seriously*, pp. 54–57 and 61–63.

that the standard has its source in the social facts. Those facts will merely show that, although people agree that there are rules, they disagree about their content. In such a situation, the facts alone will not give us any reason for selecting one version of the rule as superior to the others. It would only be possible to derive a rule from such facts by arbitrarily selecting some facts as more important than others. Therefore, if we accept that the rule of recognition has its source in social facts, it cannot be a rule unless judges usually accept it, accept that it is binding on them and agree about the scope of the obligation to apply the rules it imposes. If they disagree about the scope of that obligation, the rule of recognition cannot consist of social facts.

Therefore, the practice of adjudication in a system of the type described by Hart depends upon strict fidelity to the rules which the rule of recognition identifies and prevents the judges from considering the merits of those rules, because a refusal to apply the rules, even to avoid injustice, would be open to criticism as a lapse from accepted common or public standards. The judge could only expect to avoid this criticism if he or she could show that the principles of justice which he or she used to justify a refusal to apply a rule were common standards embodied in the rule of recognition itself. However, these standards could not form part of the rule of recognition. The rule of recognition consists of a uniform practice of using certain criteria for identifying legal rules. Principles of justice are too controversial to be reduced to a uniform practice. However, unless they can be sufficiently agreed upon to be embodied in such a practice, they cannot be used by judges who are committed to the practice to justify departures from the practice without endangering the practice itself. The practice would be endangered because without agreed standards of justice, criticism of deviations and lapses would collapse into arguments about justice, destroying the shared basis of the practice.

Not all possible justifications of adjudication which see the judge as having a duty to apply rules of law in at least some cases are consistent with a practice of adjudication of the type envisaged by Hart. As we have seen, such a practice can only exist as a

shared social practice if the rule of recognition operates both to identify the rules of the legal system and to exclude other considerations from cases to which the rules apply. Those other considerations include any considerations, such as considerations of justice, which could be used to justify departures from the rules. Any justification of the practice must justify using the rule of recognition to exclude these considerations. Hence, all justifications which allow the judges to depart from or limit rules in cases in which they have good reason to do so do not justify a practice of the type envisaged by Hart. They must be rejected in favour of a justification which justifies the use of a shared practice of adjudication based on a shared test for law even in those cases in which that practice seems to lead to injustice.

II. FORMALISM AS A THEORY OF JUDICIAL OBLIGATION

Formalism as a theory of judicial obligation claims that the judge's duty is to apply rules of law where they exist and not to depart from them, even if, by applying the rules, the judge does injustice. In that it requires judges to apply existing rules even at the cost of injustice, it meets one of the requirements of the theory of judicial obligation needed to defend positivism. In this part, I shall examine the justification which formalism offers for the claim that judges must always apply the law regardless of the justice of the result and consider whether some variant of formalism may meet the other requirement of the theory of judicial obligation which is needed to defend positivism, the requirement that the rules which it binds the judges to apply are rules identified by a test for law constituted by social practice. If there is such a variant, that variant provides a possible justification for a positivist practice of adjudication.

Formalism claims that judges must always apply the rules because the rules are the sole moral and political justification for their authority to adjudicate. Therefore, whenever they depart from the

rules, they are acting without authority and their actions are unjustified. On this theory, the fact that the result the judge arrives at by departing from the rules appears to be more just than the result which the rules dictate cannot justify a departure from the rules. Nor can the injustice or the absurdity of the decision which the rules dictate; the rules are the source and justification of the judge's authority so that the judge has no option but to apply them.

A theory of adjudication that claims that a judge has no authority apart from that conferred by the rules he applies assumes that judges do not have any authority by virtue of their office alone and that they cannot appeal to values of political morality as a justification for their decisions, at least where the rules provide an answer. As they have no separate authority by virtue of their office alone and as they cannot appeal to political morality as a justification, they are forced to fall back on the authority of the rules they are asked to apply.

This type of formalism stresses the importance of authoritative rules. It is also committed to a particular theory about the nature of the authority the rules possess. Rules may possess moral authority for two reasons. First, they may embody a political philosophy or set of values which is authoritative and which confers its authority on them. Second, they may have been enacted by a legislator which has the authority to enact them. The source of authority for rules of the type the formalist envisages is not a set of values or a political philosophy. If a set of values or political philosophy were seen as conferring authority on the rules, it is difficult to see why a judge could not appeal directly to that philosophy or morality in the cases which come before him or her to justify over-ruling or refusing to apply rules which lead to unjust results, especially where the results are inconsistent with the values in question. Therefore, formalists rule out the possibility that judges may ever be justified in appealing to a set of values to set aside a rule by claiming that all legitimate authority is necessarily derived from an ultimate legislator such as God or the people. That legislator is seen as the fount of authority for the whole legal system, in that it is the

ultimate source of authority for all the legal rules and all the institutions of the system.

The formalist claim that all legitimate authority is derived from an ultimate legislator appears to be a truism because in most political and legal systems there is an ultimate source of legal authority, some institution or group of institutions that has the legal power to change any rule or to remodel all of the institutions of the system. The claim is not a truism, however, because it not only asserts that there must be an ultimate law-making authority in every legal system, but that that law-making authority is the sole source of legitimate political authority in that system. This is a much stronger claim than the trivial claim that in every legal system there must be some institution or group of institutions that has the legal power to reshape all the rules and all the institutions of the system. Such ultimate law-making bodies as are found in most legal systems are products of the systems themselves, established by law as a repository for ultimate legal authority within that system. However, the ultimate source of all political authority as envisaged by formalism is not a product of the legal system but stands outside it and is the source of all authority within the system, including the authority of the law itself. For this reason, all authority within that system can be ultimately traced back to it.

Many theories that assume the existence of a legislator that is the sole source of authority for the legal system allow the legislator to delegate legislative power to subordinates such as judges and other officials including a limited power to the judges to overrule rules of the system which appear to be unjust and fashion new rules to replace them. Formalism itself may have to concede that such a power may be delegated to judges to allow them to fill in the gaps in those cases where there are clearly no rules to apply. However, a broad delegation of power to judges to overrule rules of the system where they appear to be unjust is inconsistent with formalism. Formalist theories of judicial duty are those which offer political justifications for not allowing the judges to exercise this power. For example, formalism may be a consequence of a democratic theory which claims that the people are the sole source

of legitimate political authority in that the only authority which may be exercised over them is that authority which they have voluntarily granted to their government. Such a theory may lead to formalism if we assume that, as a precondition of granting that authority, the people will demand an institutional structure designed to ensure that the government carries out their desires and preferences.

These assumptions produce a theory with three basic features. First, the only institutions that may legitimately exercise political authority over the people are those on which the people have conferred power. Second, these institutions may only exercise the powers which have been granted to them. Third, the way in which those powers are exercised should reflect the people's will or preferences. Ideally, the people should approve all the laws. However, if that is impossible, the laws should be made by some institution designed to assess the people's preferences and to consent to the laws on their behalf, such as a representative legislature.

Once the laws have been made, it is necessary to entrust other institutions with the authority to apply them in a fair and impartial way. These institutions are the courts. To enable them to be impartial, they are given independence and are insulated from political pressures. However, this independence entails that they have no authority to overrule rules laid down by the legislature on the grounds that they may lead to injustice because there is no way of ensuring that their decisions on these questions will reflect community desires and preferences.[29] Their only connections to the people are the grant of authority from the people to apply the rules and the rules themselves, which embody the people's

[29] Of course, if the people only grant limited powers to the legislature, it may be the task of the courts to ensure that the legislature does not exceed those powers. Judicial review of this type is consistent with the claim that the judges have no power to review legislation on the basis of its reasonableness because when considering whether legislation is within power, courts do not look at its reasonableness but compare the scope of the legislation with that of the granted powers.

preferences. Therefore, if they refuse to apply the rules, they are simply acting in an unauthorised fashion and usurping power.[30]

Giving the judges a broad discretion to overrule rules laid down by the legislature could be reconciled with this democratic formalism if the judges were made accountable to the people so that their decisions would reflect community preferences. However, that would destroy the independence and impartiality needed if they are to apply existing rules even-handedly. Hence, once it has decided upon a legislature that represents the people to make the rules, and a judiciary to apply them, democratic formalism is committed to making that judiciary independent and limiting its power to that of applying the existing rules.

A formalist theory of judicial responsibility has a number of consequences. First, the judge has no independent responsibility for the consequences of his or her decisions. As the rules are made by an authority responsible to the people and the rules derive their authority from the fact that the rule-maker is responsible to the people, the judge does not share any political responsibility for the contents of those rules. If the rules create injustice, responsibility for that injustice lies with the law-maker, not with the judge. Second, the judge is not entitled to assume responsibility for the consequences of his or her decisions. Because the only source of authority a judge possesses is the rules, as soon as the judge departs from the rules that judge is usurping power that does not belong to him or her. Even if the rules lead to iniquitous consequences, the judge only has the authority and the responsibility to apply them. Third, the theory assumes that the decisions judges make are implicit in the rules. According to the theory, in most cases at least, it is the rules, not the judges, which decide cases. If the rules are incapable of generating decisions, the theory collapses because the theory of legitimate authority on which it is based assumes that rules are a means of transferring authority from the

[30] D. Kennedy, 'Legal Formality', *Journal of Legal Studies* **2** (1973): 6, offers an elaborate analysis of this type of formalism.

people to judges and other officials. Rules do that by dictating results in particular cases so that all the judge has to do is to apply them. If the rules are incapable of dictating results, they are incapable of transferring authority from the people to the judges and the theory fails to justify adjudication. Finally, formalism does not require that the rules dictate an answer in every case. It may allow the judges to fill gaps in the rules as long as the representatives of the people retain the power to reverse the judges' decisions.

This account of judicial responsibility offers a justification for the view that it is the judges' responsibility to apply existing rules of law to the exclusion of other considerations, including considerations of justice. To that extent, it can offer a justification for positivist accounts of the practice of adjudication such as that of Hart. To provide a complete justification for that practice, it must also justify the use of a test constituted by social practice alone and accepted by the judges as a binding standard and as the sole way of identifying the rules which are to be applied.

Formalism is committed to the claim that there is a test for law which exists as a matter of fact and which can be used to identify the law. That claim is a consequence of the thesis that there is an authoritative legislator which is the sole source of the authority of the law. As the legislator is the sole source of the law's authority, its existence provides a test for law: a purported law will only be a law if it can be traced back to an exercise of authority by the ultimate legislator. That test must exist as a matter of fact because the system is only based on legitimate authority if an ultimate legislator actually exists.

However, although the test for law required by a formalist theory of adjudication must exist as a matter of fact, it is not necessarily constituted by social practice as is the positivist test. There are formalist theories in which the ultimate legislator is not seen as constituted by or as even in society; it may be outside society completely. Formalist theories, such as that of the divine right of kings, which claim that the ultimate legislator is divine, are of this type. However, there are formalist theories which see the test for law as constituted by social behaviour. These theories see the

people as a whole or a group within society as the ultimate authority behind the law. Theories of this kind include social contract theories in which the people are seen as the source of all legitimate authority and as having the power to grant that authority to institutions of government. Whether, in a particular society, the people have made such a grant is a question of fact the answer to which lies to be determined by the behaviour of the society or group in question.

If such a power has been exercised, it gives us a test for law which exists as a matter of social fact; those laws which can be traced back to an exercise of power by the ultimate authority within the community, whether it be the people as a whole or a smaller group, are valid. It follows that all laws which may be identified by the use of this test will also exist as a matter of fact and be constituted by social behaviour in the sense that their origins and content can be wholly determined by looking at the law-making acts of those on whom the authority to make law has been conferred within the community in question. Therefore a formalist theory of this type can provide a justification for the duty which positivists claim that judges have, a duty to use a test for law which is constituted by social behaviour and to apply the rules identified by that test to the exclusion of other considerations, even in cases in which they lead to injustice.

III. *THE CONCEPT OF LAW* AND FORMALISM

In *The Concept of Law*, Professor Hart described a legal system that is essentially formalist. However, because *The Concept of Law* is essentially descriptive, Professor Hart does not consider the implications of the formalism for judicial responsibility. Hart claims that the law consists of a shared practice of using rules, especially by judges and officials, as binding standards to deciding cases.[31] A central part of this practice consists of the use of shared criteria

[31] *The Concept*, pp. 91–107.

by which rules of law may be identified. These criteria Hart terms the rule of recognition. The rule of recognition provides a test for identifying the other rules of the system. If a rule meets the test, it is described as valid.[32] Although the term 'valid' has evaluative overtones, Hart does not use it to import any moral notions into his theory. When Hart describes a rule as valid, he merely means that it complies with the rule of recognition and hence qualifies as a rule of that legal system.[33]

The rule of recognition used to test the validity of other rules of the system is not, according to Hart, itself valid. By this Hart means that there is no further test for identifying it as a rule of the system. Instead, it exists in the practice of the judges and officials who use it as a common test for identifying legal rules. That practice amounts to a rule because it possesses the two features which, according to Hart, are necessary for the existence of a rule; a common practice and a shared critical attitude towards that practice.[34] I have argued in Part I that the practice to which Hart refers consists not only of a practice in which the rule of recognition is used to identify rules of law but also of a practice of adjudication in which the rules which are so identified are used to determine the law in particular cases to the exclusion of other considerations. As we have seen, that practice may be combined with a formalist theory of judicial duty to produce a coherent theory of law.

That the practice of adjudication Hart describes may be combined so coherently with a formalist theory of judicial duty suggests that Hart is implicitly committed to that theory of judicial duty. That commitment is reflected in the details of his theory, in that all of the major features of a legal system which Hart identifies correspond to the major features of a legal system in which the judges accept a formalist theory of judicial responsibility and

[32] Ibid., pp. 97–107.
[33] Ibid., pp. 97–101.
[34] Ibid., pp. 102–107.

act on the assumption that the rules of the system are the sole source of their authority to adjudicate. First, both theories stress that law is a system of rules.[35] Second, Hart argues that in a fully developed legal system, all the rules of the system may be identified by the use of criteria which he calls the rules of recognition. These criteria are used by judges and other officials to identify the other rules of the system by reference to the sources of those rules. A simple example of a rule of recognition would be 'whatever the King enacts is law'.[36] These features of a rule of recognition parallel the formalist doctrine that rules are legitimate, not because their content is legitimate, but to the extent that they are made by a legislator which is vested with legitimate authority. The fact that formalists argue that rules derive their legitimacy from being made by a legislator with authority gives the formalist a criterion for recognizing legitimate rules which is akin to Hart's rule of recognition in that it enables laws to be identified by reference to their source. Where the source of all legitimate authority, the ultimate legislator, may be equated with some persons or group within the society in question, we are able to identify all laws by observing the behaviour of that individual or group. Formalism of this type is consistent with the basic tenet of positivism that all laws have their source in social behaviour. Third, Hart's notion of power-conferring rules reflects the formalist notion that the rules, because they have been enacted by an authoritative legislator, confer legitimate authority on the judges and officials who apply them.

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[35] Much of *The Concept* is devoted to an analysis of types of rules. The central importance of rules in Hart's theory is probably best illustrated by his summary of the failings of the command theory – it failed because its elements could not explicate the idea of a rule; see *The Concept*, pp. 78–79 and his claim that the key to the science of jurisprudence can be found in the union of primary and secondary rules; *The Concept* at p. 79 and pp. 94–96. The formalist sees the law as rules which can be traced back to a grant of authority by the ultimate legislator.

[36] See *The Concept*, pp. 97–98.

An analysis of the most important of the logical relationships, that of validity, which holds between the rule of recognition and the other rules of the system shows how Hart has described formalism. Hart holds the view that in a developed legal system there are criteria, the rules of recognition, for identifying which rules are indeed rules of the system. Those rules which meet the tests laid down by the criteria are valid rules; other rules which do not meet the test are invalid. Although in Hart's theory the notion of validity merely described the relationship between the rules of recognition and other rules of the legal system, it is based on formalist ideas about the authority of judges.

That the doctrine of validity expresses a formalist view of the role of judges may be seen in those jurisdictions which have written constitutions which are used by the courts to determine the validity of legislation.[37] In these jurisdictions, when judges are confronted with invalid laws, they have no authority to take account of those laws and must treat them as if they did not exist. Hence, invalid laws do not make any change in the law at all. The parties' rights and duties fall to be determined by the law as it existed before the invalid law was passed. Therefore, the parties do not need the courts' help to ignore such an invalid law. They are entitled themselves to treat it as if it did not exist, to adopt self-help measures to resist it if appropriate, and to ask for the court's help in resisting it.[38]

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[37] The most famous expression of this theory of a written constitution is that of Marshall C. J. in *Marbury v. Madison* (1803) 1 Cranch. 137, 2 Lawyer's edition, 60 at 176–78 and 73–74 respectively. In that case, he used a formalist theory of the constitution, the theory that the constitution was a grant of authority by the people to the government, to support the doctrine of validity; i.e. the doctrine that if legislation was inconsistent with the constitution, it was of no effect and was not to be enforced by the courts.

[38] See *James v. The Commonwealth* (1939) 62 C.L.R. 339 at 361–62, per Dixon J., *Riverina Transport v. Victoria* (1937) 57 C.L.R. 327 at 341–42 per Latham C. J. and *McClintock v. The Commonwealth* (1947–48) 75

It is clear that such a view of the law entails that the judges' authority is limited to identifying those rules of law which have been enacted in accordance with the powers conferred by the people and applying those rules to the case before them. Only if the judges' authority is limited in this way is it possible to say that laws which fall outside the powers conferred are invalid and may be ignored before the court adjudicates on them. If the judge has to add to the content of the law in any way rather than merely identify it, it cannot be said that laws are either valid or invalid before the judge rules on them because ultimately it is the judge who decides the final content of the law. Therefore, it is clear that the notion of validity is based on formalist ideas about judicial responsibility.

It may be objected that although Hart's theory is similar to formalism, there are differences which show that Hart is not a formalist. Unlike the formalist, Hart does not appear to envisage power conferring rules as grants of power from a supreme source of authority outside the law and his rejection of the idea of the sovereign or the supreme commander suggests that he rejects the thesis that such an authority exists or is necessary for the existence of law.[39] However, the sovereign or supreme commander which he rejects is not the formalist sovereign or authoritative legislator. Hart's supreme commander is one who is, as a matter of fact, generally obeyed. It is clear from Hart's account that he or she need have no authority such that it could be said that it was right or proper that she or he should be obeyed. Indeed, Hart stresses that the gunman model which he describes is an attempt to build a theory of law without recourse to complex ideas such as that of authority.[40]

C.L.R. at 18–19 per Latham C. J. For a detailed analysis of the importance of the doctrine of validity in a formalist theory of the constitution, see my "Is the Constitution a Social Contract?," *Adel Law Review* **12** (1990): 249, at 266–74.

[39] *The Concept*, pp. 41–76.

[40] Ibid., pp. 52–54.

In that it lacks authority, Hart's supreme commander differs from the formalist authoritative legislator. Because it lacks authority, Hart's supreme commander could not be used as the keystone of a theory of judicial responsibility such as formalism. Indeed, it is difficult to understand how any theory of judicial responsibility could develop in a system of law based on Hart's gunman model. In that model judges presumably habitually obey commands from the supreme commander to apply his general orders to the cases which come before them. Although, if they face punishment for refusing to apply these general orders, they may feel obliged to obey, they have no obligation to obey.[41]

The formalist claim that there is a sovereign legislator which stands outside and above the law differs in that it is an attempt to explain the authority of the law rather than an attempt to show that no conception of authority is needed to explain the phenomenon of law. According to formalism, the legislator which stands above the law is not some person or group who is habitually obeyed, but some person or group who has authority and is able to confer that authority on the whole legal system. For example, some types of formalism, such as the democratic formalism outlined in Part II, argue that the people as a whole are the source of legitimate authority. According to this type of theory, each person has the capacity to bind him or herself by consent. Therefore, if everyone consents, they can establish a system of legitimate government and of binding law by surrendering power, including law making power, with respect to themselves to that government. The legitimacy of the system flows from their consent.

Far from being inconsistent with this theory of authority, I suggest that Hart's theory is implicitly committed to it in that his hypothesis that the rule of recognition is accepted as a social practice by the community or at least by officials, describes a society in which the authority of the law is derived from a surrender of power

[41] See Hart's account of obligation and the distinction which he draws between having an obligation and feeling obliged, *The Concept*, pp. 79–82.

by citizens to law making authorities. For Hart, the validity of the law is derived from the rule of recognition which is the source of the validity of the system. However, the rule of recognition is not valid, but is merely accepted in the sense that it is generally agreed, at least by officials, that it is the appropriate standard for identifying other laws.[42]

It can be seen that Hart's account describes how an agreed standard or test can be used to confer a form of validity on the whole legal system. Because Hart's theory is descriptive, he does not consider whether and in what circumstances that agreed test could itself be legitimate; he merely starts from the premise that its legitimacy or authority is accepted. However, it is easy to interpret his theory as one which describes a system in which all authority is derived from general acceptance of, or acquiescence in, a master rule as the proper test for law. Such a theory, like democratic formalism and other types of formalism based on a social contract, assumes that people have the capacity to bind themselves to a standard by agreement or by accepting it as appropriate.

According to this interpretation, the rule of recognition may be seen as the result of a social contract in which everyone is seen as having the authority to impose binding obligations on themselves by consent and as having exercised that authority to establish a legal system by agreeing to a rule of recognition for identifying the law. Interpreted in this way, the rule of recognition offers a plausible interpretation of how individual citizens may become committed to a social contract in an on-going society. As individuals use or acquiesce in the use of the rule of recognition as an appropriate test for identifying the law and use that law to guide their behaviour and criticise the behaviour of others, they indicate their commitment to the rule of recognition as an appropriate test for law. By indicating their commitment to the law in this way, they confer authority on the law to bind them and hence become bound. Once they have become bound, they cannot withdraw their

[42] *The Concept*, pp. 102–107.

commitment except with the consent of the other parties by means of a revolution.

In this part, I have argued that the major features of *The Concept of Law*, such as the rule of recognition, power conferring rules and the doctrine of validity, assume a theory about the nature of political authority similar to certain types of formalism and presuppose a formalist theory of judicial responsibility of the type which I argued in Part I was needed to provide modern positivist theories with a theory of judicial duty. However, Hart's theory differs from formalism in that it merely describes a legal system organized on formalist principles and claims that these principles are embodied in the practice of judging which is shared by judges and officials in developed legal systems. It does not commit itself to a formalist theory of judicial responsibility. In the next part, I shall argue that no other theory of judicial responsibility is as consistent as formalism with the major tenets of positivism so that positivism has little option but to adopt formalism as the theory of judicial duty which it needs to counter realist criticism.

IV. FORMALISM, HART'S ANSWER TO REALISM?

Although historically realism developed largely as a response to formalism, a formalist theory of judicial duty remains the most coherent argument that Hart and similar positivist theories have against the realist position. The strength of realism lies in its claim that there is no reason why judges are bound to apply the rules in any particular case. As we have seen, if that is accepted, it is impossible to defend the positivist thesis that the law consists solely of rules which can be identified by a test for law because if judges are not bound to apply the rules to the exclusion of other considerations, those other considerations have an equal claim to be considered as law. Formalism challenges the realist claim by arguing that the rules are the only sources of authority and the only justification for adjudication which judges have. If that it is the case, judges are bound to apply those rules because every time a judge refuses to apply a rule, that judge is wrongfully usurping power.

If this argument can be accepted, the rules are not simply one consideration which the judge ought to take into account, but are the only consideration. Hence formalism can justify the practice of criticising deviations from the legal rules by judges and officials which Hart describes and which is essential to Hart's account of law as a system of binding rules.

Formalism can not only justify Hart's account of adjudication, but is the only account of judicial duty available which defends Hart against the realist critique by providing a justification for applying the existing law in all cases to which that law can be applied.[43] No other theory of judicial responsibility, such as utilitarianism,[44] can provide such a justification. It is clear that act utilitarianism cannot generate a theory of judicial responsibility which requires judges to always apply existing rules. Act utilitarianism requires every actor, including the judge, to evaluate every act by reference to its utility. Therefore, a judge who was an act utilitarian would, when considering whether to apply a rule, have to weigh the utility of the act of applying the rule against the utility of the alternative, not applying the rule. Although a decision by a judge not to apply a rule may have undesirable consequences in that it may defeat the expectations of the parties and subject one of them to new burdens or penalties, in some cases these consequences may be outweighed by the undesirable consequences of applying the rules. In such cases, the act utilitarian judge would have a duty not to apply the rule.

Rule utilitarianism appears more likely to generate a theory which requires a judge to apply the rules in every case. Rule utilitarianism requires an actor to attempt to use the principle of utility to lay down rules for the guidance of his or her conduct. Once a person has decided on these rules, that person should use

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[43] This is not to deny that there are cases that do not fall under existing rules and that in these cases judges must make new rules.

[44] I have selected utilitarianism because of its strong historical links with positivism.

them to guide his behaviour, rather than to evaluate the utility of every act separately. Rule utilitarianism appears to have an obvious application to political and legal theory, in that it appears plausible, in a legal system, to equate the act of making the rules with the role of the legislature and the act of applying the rules to evaluate particular behaviour with the role of the judges. If the analogy holds, rule utilitarianism may generate a theory of judicial responsibility which limits the authority of the judge to that of applying the rules.

However, although the analogy is attractive, most forms of rule utilitarianism cannot provide any compelling arguments to support it. The rule utilitarian seeks to use the principle of utility to fashion rules which can be used to guide behaviour rather than to evaluate the utility of every act. Therefore, a rule utilitarian judge would seek to devise a set of rules which guide his or her behaviour and lay down his or her responsibilities as a judge. An obvious rule, where there is a separate legislature, would be a rule which requires the judge to apply those rules which have been enacted or endorsed by the legislature. However, although such a rule would have the virtue of simplicity, it is not obviously superior to more complex rules, such as one which requires the judge to apply the rules which have been laid down by the legislature except where it is demonstrable that a different rule would lead to greater utility.

Although the second rule is not obviously inferior to the first, it does ignore the intuition which appears to make rule utilitarianism attractive, the intuition that the act of legislation is analogous to an individual actor's adoption of rules and the act of adjudication is analogous to the individual's application of those rules. That analogy would be strengthened if it were possible to regard the State as a united individual or institution, acting through one organ, the legislature, when it made rules and through a different organ, the judicature, when it applied those rules. If it were possible to regard the State in this fashion, the principles of rule utilitarianism could be applied to its actions as a whole, not to the actions of each institution separately, so that the legislature could be regarded as the appropriate organ for making the rules according

to the dictates of utility and the judicature could be regarded as the appropriate organ for applying them.

Although this idea is attractive, it cannot be adopted unless there is good reason for treating the state as a united whole, acting through different organs for different purposes. One form of utilitarianism, preference utilitarianism, may be able to provide such a theory. Preference utilitarianism assumes that it is impossible for legislators and policy makers to calculate with any accuracy the impact of particular policies or laws on the welfare of the community. As this is impossible, the law maker's job is to assess the preferences of members of the community and to adopt laws which will maximise those preferences. Judges who are independent of and insulated from political pressures are not in as good a position as elected legislators to maximise preferences. Therefore preference utilitarians argue that judges should not attempt to do so. Instead, the duty of a judge is to apply the rules laid down by the legislature because those rules are seen as embodying the preferences of the community.

Of all forms of utilitarianism, preference utilitarianism appears to be the only one which is capable of generating a theory of judicial responsibility which limits the role of the judge to that of applying existing rules. Therefore, it is the only form of utilitarianism which can provide support for the salient features of Hart's theory.

Preference utilitarianism is able to provide this justification because it is a type of formalism indistinguishable from the democratic formalism considered in Part II.[45] Democratic formalism claims that in the absence of any moral standards which can be used to justify political decisions, legitimate authority can only arise if the people voluntarily submit to such authority. It argues that the people are only likely to agree to such an authority if it is established in a way which will ensure that as far as possible, it

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[45] Kennedy op. cit. note 4 demonstrates the close connection between democratic formalism and preference utilitarianism.

implements their desires and preferences. If it were practical, the people would require that every decision be taken by them as a whole. If this is not possible, it may be necessary to delegate the responsibility for making decisions to a small group. However, if that is necessary, the people would insist that the group be established in a way which enabled it to reflect their desires and preferences. They would want the decisions of that group to be cast in the form of general rules which they could take into account when making their own decisions, rather than after the event decisions which they could not predict. Hence, the people would opt for a body which represented their views to make general rules and another, impartial body to apply them even-handedly.

Preference utilitarianism reaches the same conclusions by a different route. It does not deny that there are moral standards which can be used to evaluate political decisions. Instead, it asserts that they are to be evaluated by reference to the principle of utility and claims that the most accurate way of measuring the utility of a decision is to ask the people who will be affected by it whether they want that decision or not. This in effect makes the people's preferences the effective measure of all value; if the people want it, it is good, if the people do not want it, it is bad.

These assumptions mean that preference utilitarianism, like democratic formalism, sees the people as the repository of all legitimate political authority. For the preference utilitarian, political authority is consistent with utility and hence justifiable, only if the people want it. Therefore, political authorities may only exercise such powers as the people choose to confer on them, and their decisions will only be justified by utility to the extent that they maximise the people's preferences. Hence, the preference utilitarian is likely to opt for a representative legislature to make the law and an independent judiciary to apply it for reasons which are indistinguishable from those of the democratic formalist.

Therefore utilitarianism cannot offer any alternative theoretical justification for the view that judges are under a conclusive duty to apply existing law. The only form of utilitarianism, preference utilitarianism, which can provide such a justification, is identical

to democratic formalism and hence is subject to all of the defects of that theory.

A theory which appears to offer an alternative justification based on less contentious premises can be constructed from *The Concept of Law*. It is unfair to attribute the theory to Hart because he is more concerned with conceptual analysis than with developing a theory of judicial responsibility. However, in his analysis of rule scepticism, Hart draws an analogy between the umpire of a game and the judge.[46] Hart points out that in a game the players use the rules to guide their behaviour and to calculate the score. The appointment of an umpire does not significantly change the way in which they use the rules. However, it does change the authority that can be attached to their judgments about the application of the rules and about the score. Before the appointment of an umpire, the players' calculations are authoritative in that they have to determine the score for themselves. After the umpire is appointed, they still make judgments about the score, but those judgments are for their own guidance and are not authoritative. Instead, the umpire's decisions are now authoritative.[47]

Not only are the umpire's decisions authoritative, but they are also likely to be final, in that there may be no appeal against them, even if they are wrong. This gives the umpire power. The umpire may be able to transform or destroy the game by refusing to apply the rules or by applying them inconsistently.[48] Therefore, it may be argued that the umpire has a clear duty to apply the rules of the game in every case, regardless of the umpire's personal views about the wisdom of the rules. To fail to do so destroys the point of the game and hence of having an umpire.[49]

There are similarities between the law and games. Just as the players in a game use the rules of the game to guide their behaviour, citizens use law as a guide. Just as the addition of an umpire

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46 *The Concept*, pp. 138–43.
47 Ibid., pp. 139–40.
48 Ibid., pp. 140–41.
49 Id.

does not change the way in which the players use the rules, but merely alters the authority which can be attached to their judgments, the existence of judges does not alter the way in which citizens use the law but merely alters the authority of their pronouncements.

From these similarities it may seem that the judge's duty is similar to that of the umpire: to always apply the rules. It may seem that judges have this duty, because, like umpires, their power to make final authoritative judgments gives them the capacity to transform or destroy the law by consistently refusing to follow the rules. If they used that power, they could transform the law into something approaching "judges' discretion".[50] If judges used their power in this way, citizens would no longer be able to use the law with any certainty to evaluate their own behaviour. This would transform the law and defeat its point, because the basic point of law is to give citizens standards with which to guide their behaviour. The function of the judges, although crucial, is peripheral in that cases only come before the judges when this system of guidance fails and a dispute arises. Therefore, it may seem that judges, like umpires, are under a duty to follow the rules.

If this argument can be accepted, it has the advantage that it appears to be based on less controversial assumptions than formalism. Unlike formalism, it appears to derive the judges' obligation to apply legal rules from the point of having those rules rather than from the controversial claim that the judges' authority must be derived by means of rules from some authoritative legislator who stands above the law.

However, the only form of the argument which is strong enough to defend Hart against the realist critique collapses into formalism. The argument is similar to a common argument in favour of judicial restraint, the argument that judges should be slow to over-rule existing law because to do so will defeat settled expectations. Both stress that a failure to apply the rules makes it difficult for people

[50] Ibid., pp. 141–42.

to use the rules as a guide. However, the argument that judges should not defeat settled expectations is rarely seen as ruling out all changes to settled law. Instead, it is usually regarded as just one consideration to be taken into account. In any particular case it may be outweighed by other considerations, such as the injustice of the settled rules. Such an argument is not decisive enough to provide a theory of adjudication which will defend Hart against the realist critique because, as argued above,[51] Hart can only defend his thesis if judges must apply the rules in every case. Therefore, unless the argument that a consistent failure to apply the rules will defeat the point of law can, unlike the argument that judges should not defeat settled expectations, justify the judges' having a duty to always apply the rules, it cannot provide the theory of judicial responsibility which Hart needs.

The analogy with the umpire of a game suggests that the argument can provide such a conclusive reason. It is apparent that the umpire of a game has a conclusive duty to apply the rules of the game, because if he or she fails to do so, he or she destroys the point of the game. It may seem that similarly, if judges refuse to apply the law, they will destroy the point of the law.

The analogy is misleading because of the differences between law and games. Unlike law, games are voluntary cooperative enterprises that cannot be played at all without some commitment to the rules, even on the part of cheats. The role of the umpire is to help the players participate in the game by applying the rules fairly and even-handedly. Because of the voluntary, cooperative nature of games, the umpire does not have to consider other factors such as the fairness of the rules. If the players believe that the rules are unfair, they can stop playing.

The judge is in a different position because law is not a voluntary cooperative enterprise. We are born subject to laws and cannot choose to opt out of the legal system unless we leave the jurisdiction. Laws impose on us obligations that we find onerous and

[51] Part I.

that we would opt out of if we could, such as the obligation to pay tax. Furthermore, in almost every case which comes before a judge, at least one of the parties is forced to appear and would not appear by choice.

The coercive nature of law changes the perspective of the judge. Unlike the umpire of a game, who is charged with ensuring the success of a voluntary cooperative enterprise by implementing the rules fairly, the judge cannot simply apply the rules and ignore the consequences. Because the parties before him or her have not chosen to be subject to the law, but are forced to comply, the judge in every case must confront a question which the umpire does not have to consider: in this case, is it fair to force this party to comply with this rule of law? That question forces the judge to take responsibility for the decisions. It cannot be answered by pointing out that just as an umpire can destroy the point of a game by refusing to apply the rules, the judges can destroy the point of law by refusing to apply the legal rules, because it may be better, all things considered, if the law were destroyed. In considering whether it is fair to force a particular person to comply with a particular rule, the impact which a refusal to apply the rule will have on the usefulness of law to citizens as a guide to their behaviour is only one of the considerations which a judge must take into account. He or she must also consider the fairness of the rule to the particular parties and the propriety of using the power of the state to enforce the rule, both now and in the future. Hence, because, unlike a game, law is not a voluntary cooperative enterprise, the argument that judges must always apply the law or risk defeating its point cannot provide the conclusive reason for always applying the rules which Hart needs to defeat the realist critique. The argument could only provide such a conclusive reason if, like games, law was a voluntary cooperative enterprise.

There is one theory of law which does regard the law as a voluntary co-operative enterprise. That theory is a variety of formalism itself. Formalism is based on the assumption that all legitimate authority lies in a legislator which stands apart from

and above the law.[52] In many formalist theories, including the ones which view the law as a voluntary cooperative enterprise, that legislator is the people considered as a body. A powerful argument for the view that the people are the source of all legitimate authority can be derived from the assumption that there are no background standards of ethics or morals which can be used to justify political obligations. Accordingly a person only becomes subject to an obligation when he or she agrees to that obligation or voluntarily surrenders the power to impose such obligations to another. On this view, law can arise only when a body of people voluntarily surrender power to make laws to some authority.[53]

This type of theory views law as a voluntary cooperative enterprise because it views all law as being the result of a voluntary submission to authority by all citizens. It explains even the coercive elements in law by claiming that everyone has voluntarily agreed to them.[54] As it views law as a voluntary cooperative enterprise, the analogy with games holds and the role of the judge may be equated with that of the umpire. Just as the only responsibility of the umpire is to further the point of the game by applying the rules in every case, the only responsibility of the judge is to further the point of law by always applying the rules. By equating law with a voluntary cooperative enterprise this type of formalism elevates the claim that, if judges do not apply the existing legal rules in every case, they will defeat the purpose of the legal system into a justification for always applying the rules.

Although formalism can be used to defend the argument that judges must always apply existing rules because, if they fail to do so, they will destroy the point of the legal system, it does so by destroying that argument's original attraction. The argument's

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[52] See Part II, supra.
[53] The most famous example of this argument is that of Hobbes, in *Leviathan*.
[54] See, for example, *Leviathan*, ch. 18, esp. p. 232.

attraction was that it provided a less contentious alternative to formalism as a basis for the thesis that a judge's responsibility was always to apply the rules. It only provides that alternative if it holds good independently of formalism. As it holds good only in the context of formalism, it collapses into formalism and does not provide an independent justification for Hart's theory.

CONCLUSION

This article has argued that Hart's theory of law and other theories which accept the thesis that the law consists of social behaviour are implicitly but strongly committed to formalism, the theory that the judge is always under an obligation to apply existing rules of law. The article has attempted to show how key elements in Hart's theory such as his account of obligation and the internal point of view, the rule of recognition as a rule constituted by social practice, validity, and power-conferring rules are based on an implicit formalism. It has also argued that Hart's theory is incomplete in that it needs to be supplemented by a prescriptive theory of judicial responsibility if it is to provide a complete answer to the realist and that the only theory of judicial responsibility which can be married to Hart's theory is that of formalism.

Hart's implicit but necessary commitment to formalism flows from the nature of his theory which, like some types of formalism, views the law as a voluntary cooperative enterprise. Hart sought the key to the science of jurisprudence in the notion that law consists of rules which are laid down and identified according to agreed tests.[55] These tests are rules constituted by social behaviour consisting of a uniform practice and a critical attitude towards that practice, such that deviations from the practice are seen as warranting criticism.[56]

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[55] *The Concept*, pp. 89–114.
[56] Ibid., pp. 54–57.

This account of rules has been subjected to criticism by Professor Ronald Dworkin.[57] He has argued that Hart's account of rules ties the justification of rules too closely to social practices. As he points out, some rules, such as rules against murder and violence, would be considered justified even if they conflicted with social practice. Other rules, such as rules of etiquette, are in part justified by social practices. Even in these cases, Dworkin argues that the practices in question justify rather than, as Hart claims, constitute the rules. The difference is that if social practices justify rules, the rules which they justify may not correspond completely with the practices in question. However, if social practices constitute rules, the rules must correspond completely with the practices in question.

For the most part, Dworkin's criticisms may be accepted. However, there is a class of practice which does constitute rules in that a practice of accepting a set of rules as an appropriate guide to behaviour constitutes those rules and the enterprise that those rules make possible. In these practices, the practice does not justify the rules but is merely a practice of accepting a set of rules so that the rules correspond completely to the practice in the way Hart describes. The most common examples of practices of this type are games in which the rules have been formalised to the extent that there are agreed tests for making and identifying them, and the rules which have been so made and identified are seen as complete in the sense that they encompass all of the rules of the game.

These games are voluntary cooperative enterprises in that the tests for making and identifying the rules of the game can only be effective while they are generally accepted by the players. They derive their authoritative status from the fact that they are generally accepted. In Hart's terms, such tests cannot be described as valid rules of the game, but are merely accepted by the players as the

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[57] Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), ch. 3, esp. pp. 48–58.

correct test for identifying the other rules. These other rules derive their validity from the tests. If the tests lose general acceptance, the game will collapse in the sense that there will no longer be agreement as to the rules.

Hart sees the law as a voluntary cooperative enterprise similar to these games, because for Hart the foundation of the law is the rule of recognition, a social practice in which the voluntary acceptance of a standard as an appropriate test for law at least by officials, constitutes the legal system. It is probable that any theory of law which claims that law has its source in social facts is committed to the claim that law is a voluntary cooperative enterprise. Theories which claim that law has its origins in social fact necessarily view law as a system of rules identifiable by a test or tests. They view law in this way because the claim that law has its source in social facts entails that law is created by the behaviour of people in society. It follows that if the society were watched for a long period, and if the observer knew what behaviour to look for, he would be able to record all law-creating events. As long as those events are recorded and as long we know what events count as law-creating, we can also discover all the law of that society. Tests for law such as the rule of recognition tell us what events count and enable us to identify the law. By providing a test for law which marks off law from other types of standards such as morality, tests of this type rule out the possibility that rules of law derive their authority from these standards. In other words, they rule out the claim that legal rules are binding because they are a subclass of binding moral or political standards. Therefore, theories of this type must base the authority of the law on a different claim.

One such claim, which I have argued underlies both positivism and some types of formalism, would derive the authority of the law from our acceptance of it. On this view, acceptance of a test as the proper standard for identifying all law-creating events and hence all law is not only constitutive of the legal system, but also acts as a grant of authority to that system. By accepting the test for law we commit ourselves to the system and grant it authority over us. On this view, law is a voluntary cooperative enterprise

by which people create authority and confer it on law-making officials by accepting as appropriate certain tests for identifying all law-creating events. If enough people accept the same tests for law-creating, they are able to confer authority to make the law onto a legislature. When they do this, they form a society governed by law. In this society, it is rational to set up the legislature so that it reflects the preferences of the community and to limit the role of the judges to that of applying the rules, that is to impose a duty on the judges to act as formalists.

Dept. of Law,
University of Tasmania,
Hobart, Australia