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REJOINDERS TO HART ON RULES AND RIGHTS

Stanley L. Paulson*

LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART. Edited by P.M.S. Hacker and J. Raz. Oxford and New York: Oxford University Press. 1977. Pp. viii, 312. \$16.50.

In the concluding chapter of *The Vocabulary of Politics* (1947), the British philosopher, T.D. Weldon, wrote that "the questions of traditional political philosophy" are simply "confused formulations of purely empirical difficulties."¹ Weldon's remark reflected the sad state of political philosophy immediately following the War, and the situation in legal philosophy was not much better. Although American Legal Realism in its heyday had had some of the trappings of a movement,² it never recovered from the extraordinarily naive "scientist" experiments in the early 1930s at the Johns Hopkins Institute of Law and at Yale (where Underhill Moore conducted studies on parking).³ And though elements of the traditional natural law theory were evident in American work on "constitutionalism,"⁴ that work was largely historical; taken on the merits, the traditional natural law theory has had few apologists in Anglo-American legal philosophy. Finally, although some branches of analytical philosophy were alive and well in the early post-War period,⁵ moral philosophy, like political philosophy, had been all but killed by the barren "emotive theory of value," a corollary of earlier versions of the logical positivists' verification principle.⁶

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1. T.D. WELDON, *THE VOCABULARY OF POLITICS* 192 (1947).

2. See Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *HARV. L. REV.* 1222, 1233-34 (1931).

3. See generally W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 56-69 (1973). "The image of Underhill Moore sitting on a camp stool in Bermuda shorts in the streets of New Haven solemnly counting cars," *id.* at 65, reflects something of the disdain of the academic law profession for Moore's enterprise but is, as Twining goes on to argue, less than fair.

4. See, e.g., C. McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (rev. ed. 1947).

5. One thinks, for example, of contributions to the philosophy of language, e.g., R. CARNAP, *MEANING AND NECESSITY* (1947).

6. On the logical positivists' verification principle, see A. J. AYER, *LANGUAGE, TRUTH AND LOGIC* 133-45 (2d ed. 1946). On the implications of the verification principle for moral

The scene has changed dramatically in the years since Weldon's *The Vocabulary of Politics*. In political philosophy, John Rawls's monumental *A Theory of Justice* (1971) has created anew the field of normative political philosophy. In legal philosophy, Ronald Dworkin's *Taking Rights Seriously* (1977) is eloquent testimony to the role played by his predecessor in the Chair of Jurisprudence at Oxford, H.L.A. Hart—it was, after all, Hart's legal positivism, and his theory of adjudication in particular, that set the stage for Dworkin's arguments.⁷ More generally, Hart's work marks a rebirth of legal philosophy in the English-speaking countries. In his 1971 inaugural lecture at Oxford, Dworkin observed that "[t]he province of jurisprudence is now the province [Hart] has travelled,"⁸ thereby calling to mind the *locus classicus* of legal positivism, John Austin's *The Province of Jurisprudence Determined* (1832), and suggesting something of the magnitude of Hart's achievement.

The present collection, a *Festschrift* in honor of Professor Hart on his seventieth birthday, brings together papers written by Hart's colleagues, former students, and other "devotees," as the editors put it. The contributions, of high quality and considerable diversity in subject and style, are evidence of the transformation wrought by Hart in the thirty years since Weldon's pronouncement. The sixteen papers include several concerned primarily with Hart's legal philosophy, especially as developed in *The Concept of Law* (1961). Others are on fundamental concepts in the law (for example, rights), and still others are on problems in moral philosophy.⁹

philosophy, see *id.* at 87-102. Hempel, *Problems and Changes in the Empiricist Criterion of Meaning*, 4 *REVUE INTERNATIONALE DE PHILOSOPHIE* 41 (1950), reprinted in *LOGICAL POSITIVISM* 108 (A. J. Ayer ed. 1959), is a useful critical statement.

7. See H.L.A. HART, *THE CONCEPT OF LAW* 121-50 (1961) [hereinafter cited as *THE CONCEPT OF LAW*].

8. Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057 (1975).

9. Along with the papers I discuss below, the *Festschrift* includes: G.P. Baker, *Defeasibility and Meaning*; B.M. Barry, *Justice Between Generations*; R. Cross, *The House of Lords and the Rules of Precedent*; R.M. Dworkin, *No Right Answer?*; J. Feinberg, *Harm and Self-Interest*; J.M. Finnis, *Scepticism, Self-Refutation, and the Good of Truth*; P.R. Foot, *Approval and Disapproval*; P.M.S. Hacker, *Hart's Philosophy of Law*; A.J.P. Kenny, *Intention and Mens Rea in Murder*; J.R. Lucas, *The Phenomenon of Law*; J.L. Mackie, *The Grounds of Responsibility*; G. Marshall, *Positivism, Adjudication, and Democracy*; J. Raz, *Promises and Obligations*; and R.S. Summers, *Naive Instrumentalism and the Law*.

The editors have added a bibliography of Hart's published writings, to which the following omissions and recent additions may be appended (in chronological order): *Book Review*, 70 *LAW Q. REV.* 115 (1954) (review of W. FRIEDMANN, *LAW AND SOCIAL CHANGE IN*

Rather than survey the lot, I have selected two themes in Hart's legal philosophy for closer examination: the topic of legal rules—in particular, the question of distinct types of legal rules—and the topic of rights. A.M. Honoré, Hart's collaborator on a major work, *Causation in the Law* (1959), and, more recently the author of several highly original papers in jurisprudence,¹⁰ has written another such paper for the *Festschrift*, namely "Real Laws." Honoré challenges Hart's now familiar taxonomy of duty-imposing and power-conferring rules (or, what is not quite the same thing to Hart, primary and secondary rules)¹¹ and offers instead a very different scheme drawn from "professional" (that is, legal) rather than "philosophical" discourse. I raise questions about the distinction between two types of legal rules, beginning with a look at the arguments that Hart offers for his celebrated distinction. These arguments, I contend, do not fare as well as the distinction itself. I then turn to Honoré's taxonomy of legal rules, looking at the results and also at Honoré's motivation for working along lines so unlike Hart's.

The other theme I have chosen to examine, that of rights, is equally familiar—is, indeed, the dominant theme in much current work in legal philosophy.¹² In his *Festschrift* contribution,

CONTEMPORARY BRITAIN (1951)); *Causation in the Law* (with A.M. Honoré), 72 LAW Q. REV. 58, 260, 398 (1956); *Should the Death Penalty Be Abolished?*, 55 THE LISTENER 87 (1956); *A View of America*, 59 THE LISTENER 89 (1958); *Austin's Influence*, 78 OXFORD MAGAZINE 206 (1960); *Jurisprudence*, in THE CONCISE ENCYCLOPEDIA OF WESTERN PHILOSOPHY AND PHILOSOPHERS 143 (1st ed. J.O. Urmson 1960); Book Review, 69 PHIL. REV. 270 (1960) (review of H. KANTOROWICZ, *THE DEFINITION OF LAW* (1958)); *Duty*, in A DICTIONARY OF THE SOCIAL SCIENCES 213 (J. Gould & W. Kolb eds. 1964); Book Review, 74 YALE L.J. 1325 (1965) (review of B. WOOTON, *CRIME AND THE CRIMINAL LAW* (1963)); *Austin, John*, in 1 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 471 (2d ed. 1967); *Austin, John*, in 2 ENCYCLOPAEDIA BRITANNICA 772 (14th ed. 1970); *Bentham and the United States of America*, 19 J. LAW & ECON. 547 (1976); *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977); J. BENTHAM, A COMMENT ON THE COMMENTARIES and A FRAGMENT ON GOVERNMENT (J.H. Burns & H.L.A. Hart eds. 1977); *Morality and Reality*, N.Y. REV. BOOKS, March 9, 1978, at 35 (review of G. HARMAN, *THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS* (1977) and J.L. MACKIE, *ETHICS: INVESTING RIGHT AND WRONG* (1977)); *Between Utility and Rights*, 79 COLUM. L. REV. (forthcoming) (John Dewey Lecture, Columbia Law School).

10. Honoré, *Groups, Laws, and Obedience*, in OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 1 (A.W.B. Simpson ed. 1973); Honoré, *What is a Group?*, 61 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 161 (1975).

11. See THE CONCEPT OF LAW, *supra* note 7, at 26-48, 77-96.

12. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), and the critical response to Dworkin, which includes the papers in the Jurisprudence Symposium, 11 GA. L. REV. (1977), held on the occasion of H.L.A. Hart's Sibley Lecture at the University of Georgia School of Law, and also: Finnis, *Some Professorial Fallacies about Rights*, 4 ADELAIDE L. REV. 377 (1972); Levinson, *Taking Law Seriously: Reflections on "Thinking Like a Lawyer"*, 30 STAN. L. REV. 1071 (1978) (review of R. DWORKIN, *supra*); MacCormick, *Dworkin*

"Rights and Legislation," D.N. MacCormick, Regius Professor of Public Law at the University of Edinburgh and author of *Legal Reasoning and Legal Theory* (1978) in the Clarendon Law Series, develops a powerful critique of Hart's "will" theory of legal rights. He goes on to offer arguments on behalf of a competing theory, the "interest" theory, and I examine those arguments at some length.

I. PROBLEMS FOR HART ON TWO TYPES OF LEGAL RULES

Hart's arguments for two types of legal rules are developed in the course of a powerful critique of John Austin, historically the most influential proponent of classical legal positivism.¹³ Austin supposed that there was but one type of legal norm, namely the command. In the opening lecture of the *Province*, he provides a generic characterization of the command, inviting attention to its three components: (i) the commander's intention that a party act or forbear from acting in a particular way, (ii) the commander's expression of his intention to the party, and (iii) the commander's power to impose a sanction if the commanded party should fail to comply with the directive.¹⁴ The *differentiae* that turn this characterization of the genus, namely the command, into a characterization of one species of command, namely positive law, include: (iv) the identification of the commander as the sovereign or as an agent of the sovereign and (v) the formal requirement that the command be general, ranging over the acts of a class, rather than particular.¹⁵ For Austin, positive laws are commands thus defined, and he recognizes no other type of legal norm.

as *Pre-Benthamite*, 87 PHIL. REV. 585 (1978); N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 229-64 (1978); Raz, *Professor Dworkin's Theory of Rights*, 26 POLITICAL STUD. 123 (1978); Richards, *Taking Rights Seriously Seriously: Reflections on Dworkin and the American Revival of Natural Law*, 52 N.Y.U. L. REV. 1265 (1977); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977); Note, *Dworkin's "Rights Thesis"*, 74 MICH. L. REV. 1167 (1976).

13. While Austin has been the most influential figure historically, a reassessment in recent years of Bentham's place in jurisprudence has established him as the foremost analytical jurist in the English tradition. See generally R.W.M. DIAS, JURISPRUDENCE 457-69 (4th ed. 1976); Hart, *Bentham's "Of Laws in General"*, in 2 RECHTSLEHRE 55 (1971), and in 2 CAMBRIAN L. REV. 24 (1971). On Hart's fundamental contribution to the reassessment, see text at notes 52-53 *infra*.

14. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 17 (H.L.A. Hart ed. 1954). First published in 1832, the *Province* consists of the first six lectures of what was published posthumously in two volumes as the LECTURES ON JURISPRUDENCE (5th ed. R. Campbell 1885).

15. J. AUSTIN, PROVINCE, *supra* note 14, at 193-216, 18-23.

Hart's response to Austin seems clear enough. A single model for norms, according to which all are general commands, will not do. Alongside commands or duty-imposing rules, there are power-conferring rules, a distinct type of legal norm. Some rules of the latter type empower individuals to enter into contracts, draw up wills, transfer titles, and the like; some empower legal officials to promulgate laws, adjudicate disputes, and so on. The distinction between the two types of legal norms, as Hart takes pains to show, is the "radical difference in function between laws that confer such powers"¹⁶ on the one hand and, on the other, laws that impose duties on individuals, such as, for example, the rules of a criminal code. As Hart puts it in the case of private law power-conferring rules, "they provide individuals with *facilities* for realizing their wishes," enabling them "to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law."¹⁷

Hart's distinction between the two types of rules has been generally acclaimed, but the arguments he offers in support of it are questionable. Each of his arguments may be understood as a reply to a "monistic" position according to which there is but one norm-type and, therefore, no occasion for distinguishing duty-imposing and power-conferring rules as distinct types. The first monistic position adumbrated by Hart is not expressly defended by anyone in legal philosophy, though writers of very different persuasions have tacitly endorsed it.¹⁸ I will speak here of an unnamed "nullity-theorist" who argues that the so-called power-conferring rules are simply a special case of the duty-imposing rule—an argument that turns on a particular interpretation of nullity. The second monistic position that Hart examines has been defended at length by members of the Vienna School of Legal Philosophy.¹⁹ In particular, Hans Kelsen argues (as Hart

16. THE CONCEPT OF LAW, *supra* note 7, at 28.

17. *Id.* at 27.

18. In *id.* at 239, Hart suggests that J. AUSTIN, LECTURES, *supra* note 14, at 452-57, "adopts but does not develop" such a monistic position. See also H.M. HART & A.M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 149 (tent. ed. 1958).

19. See Merkl, *Prolegomena einer Theorie des rechtlichen Stufenbaues*, in GESELLSCHAFT, STAAT UND RECHT 252 (A. Verdross ed. 1931), reprinted in 2 DIE WIENER RECHTSTHEORETISCHE SCHULE 1311 (H. Klecatsky, et al., eds. 1968) [hereinafter cited as WIENER SCHULE]; H. KELSEN, GENERAL THEORY OF LAW AND STATE 58-62, 143-44 (A. Wedberg trans. 1945); H. KELSEN, REINE RECHTSLEHRE §§ 5(a), 6(b), (e), 16-18, 35(d) (2d ed. 1960) [hereinafter cited as REINE RECHTSLEHRE]. (The English translation of the *Reine Rechtslehre* (M. Knight trans. 1967) is inaccurate at some points and incomplete as well.

understands him) that power-conferring rules are parts of a composite duty-imposing rule.

A. *Hart's nullity-theorist*²⁰

The nullity-theorist compares the untoward consequence of failing to comply with a duty-imposing rule, namely a sanction, with the untoward consequence of failing to satisfy the conditions specified in a power-conferring rule, namely a nullity. In the end, sanction and nullity come to the same thing. Hart replies that the comparison is grossly misleading. While the sanction is only contingently related to the duty-imposing rule, that is, a failure to comply may or may not be followed by a sanction, the nullity follows necessarily upon a failure to satisfy the conditions of the power-conferring rule.²¹

Now it seems entirely proper to resist, as Hart does, the nullity-theorist's effort deliberately to conflate duty-imposing and power-conferring rules, but the question remains: Has Hart shown the two to be different? Not, I think, when he says that the nullity follows necessarily upon a failure to satisfy the conditions of a power-conferring rule. For in the case of adjudicative and public law power-conferring rules, the consequence of nullity is only contingently related to a failure to satisfy one or more of the conditions specified in the rule. Hart himself is clear on the matter.

If a would-be testator omits to sign or obtain two witnesses to his will, what he writes has no legal status or effect. A court's order is not, however, treated in this way even if it is plainly one outside the jurisdiction of the court to make. It is obviously in the interests of public order that a court's decision should have legal authority until a superior court certifies its invalidity, even if it is one which the court should not legally have given.²²

Hart's view of the consequences of failing to satisfy conditions of public law power-conferring rules is well-taken. The alternative, to suppose that a failure to satisfy all the conditions of adjudication renders a judge's holding *eo ipso* null and void, would undermine legal certainty.²³ How, in a given instance, are we to know

Quotations in the text at notes 29 and 35 *infra* are my own translations, and they along with other references to the *Reine Rechtslehre* are cited by section number rather than page number to facilitate reference to the English translation.)

20. See THE CONCEPT OF LAW, *supra* note 7, at 33-35.

21. *Id.* at 34-35.

22. *Id.* at 30.

23. By "legal certainty" I have in mind not predictability but rather, the capacity of

that a condition of adjudication has not obtained? More fundamentally, how are the various determinate conditions of adjudication in a given proceeding to be identified? Since our inability conclusively to answer such questions would threaten the certainty of the law—would, that is, if our answers had any impact—we are, with Hart (and the received opinion), better off viewing a failure to satisfy the conditions of the public law power-conferring rules on the one hand, and the consequence thereof on the other, as only contingently related. A failure to satisfy these conditions renders the rule subject to invalidation, but does not render it null and void.²⁴

But if Hart takes seriously his own professed position on the public power-conferring rule, as, I have argued, he must, it is hard to see how he has any reply to the nullity-theorist. For he contends, in his rejoinder to the nullity-theorist, that the nullity is necessarily, and the sanction only contingently linked to its corresponding rule-type. The rejoinder is inconsistent with his own correct statement that a failure to satisfy the conditions of a public law power-conferring rule is only contingently related to the consequence thereof.

B. Hart on Kelsen's hypothetical legal norm²⁵

Hart's second antagonist is Hans Kelsen—in Hart's own words, "the most stimulating writer on analytical jurisprudence of our day."²⁶ Kelsen's theory of legal norms, developed in the book from which Hart draws, the *General Theory of Law and State* (1945), and in the *Reine Rechtslehre* (2d ed. 1960),²⁷ in no way denies, as Austin had, a role for power-conferring rules. Rather, Kelsen treats power-conferring rules as "fragments" or

the legal system to provide a dispositive answer to questions of legal validity at any juncture in the legal process. The legal positivists' rejoinder to those in the natural law tradition who would deny legal certainty is instructive here. See, e.g., J. AUSTIN, PROVINCE, *supra* note 14, at 184-86; T. HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 54-55 (J. Cropsey ed. 1971); G. RADBRUCH, RECHTSPHILOSOPHIE 164-65 (8th ed. E. Wolf & H.-P. Schneider 1973). For an examination of the role this peculiarly legal notion of certainty plays in the theory of legal validity, see Paulson, *Neue Grundlagen für einen Begriff der Rechtsgeltung*, 65 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 1 (1979).

24. See generally Kelsen, *Über Staatsunrecht*, 40 ZEITSCHRIFT FÜR DAS PRIVAT- UND ÖFFENTLICHE RECHT DER GEGENWART 1, 47-95 (1914), reprinted in 1 WIENER SCHULE, *supra* note 19, at 957, 998-1040.

25. See THE CONCEPT OF LAW, *supra* note 7, at 35-41.

26. Hart, *Kelsen Visited*, 10 UCLA L. REV. 709, 728 (1963).

27. See note 19 *supra*.

parts of more complex rules that are formulated hypothetically. As Hart puts it, "[a]ll genuine laws, on [Kelsen's] view, are conditional orders to officials to apply sanctions. They are all of the form, 'If anything of a kind X is done or omitted or happens, then apply sanction of a kind Y.'"²⁸ By building all of the conditions for the application of the "conditional order" into the antecedent, Kelsen says, we are able to spell out the ways, substantive and procedural, in which the entire legal order impinges on a given application of law. Kelsen's own sketch of what he terms a complete legal norm (*vollständige Rechtsnorm*), that is, a hypothetical legal norm embracing all of the antecedent conditions, looks like this:

If an official whose appointment is governed by a general legal norm has established in a procedure prescribed by a general legal norm that facts are present with which a general legal norm associates a certain sanction, then this official, in a proceeding prescribed by a general norm, ought to impose a sanction as provided in the aforementioned general legal norm.²⁹

As with his reply to the nullity-theorist, Hart's objection to Kelsen strikes a sympathetic chord, at least initially. For Kelsen's complete legal norm does seem to culminate in the duty to impose a sanction. And this effort "to reduce apparently distinct varieties of legal rule to a single form alleged to convey the quintessence of law," Hart contends, "distort[s] the different social functions which different types of legal rule perform."³⁰

But Hart's judgment seriously misleads, I think, on two counts. First, Kelsen does speak of conferrals of power, that is, of authorizing norms (*ermächtigende Normen*), and of their "social function" too;³¹ he and Hart differ not on the presence of a power-conferring function in the law, but rather, on the connection between that function and the form, or type, of norm with which the function is associated. Hart's view is that distinct functions correspond to distinct norm-types, while for Kelsen distinct functions are found within a single, composite norm-type.³² Does Hart have a basis for criticizing Kelsen here? Only if he is prepared to argue for the truth of his assumption that distinct func-

28. THE CONCEPT OF LAW, *supra* note 7, at 35.

29. REINE RECHTSLEHRE, *supra* note 19, § 35(d).

30. THE CONCEPT OF LAW, *supra* note 7, at 38.

31. REINE RECHTSLEHRE, *supra* note 19, §§ 4(d), 29(d), 34(b),(c).

32. *Id.* § 4(b),(d); Kelsen, *Vom Geltungsgrund des Rechts*, in *VÖLKERRECHT UND RECHTLICHES WELTBILD* 157 (F.A. v.d. Heydte, et al., eds. 1960), reprinted in 2 *WIENER SCHULE*, *supra* note 19, at 1417.

tions correspond to distinct norm-types—and that he has not done. Absent argument, any criticism that turns on his assumption simply begs the question.

Still, the question of form and function aside, is Hart not correct in concluding that Kelsen's hypothetical legal norm is in error because it culminates in the duty to impose a sanction? This question invites attention to the second way in which Hart's reading of Kelsen misleads. Consider, for the sake of simplicity, a short version of Kelsen's hypothetical legal norm:

If a legal subject fails to do *x*, then a legal official ought to impose a certain sanction.

In all of Kelsen's talk about norms, the "ought" is to be regarded as akin to a variable expression, subject to different interpretations for different normative modalities.³³ In the case of the hypothetical legal norm (above), Kelsen understands the "ought" as imputing (*zurechnen*) liability to the subject, and the liability of the subject marks, in turn, a conferral of power on the official.³⁴ The subject is legally liable to the imposition of the sanction, and the official is empowered to impose it. But is the official simply empowered to impose the sanction, or is he commanded to do so? As Kelsen sees it, if he is commanded to impose the sanction, that fact has to be reflected in a second norm—one that imposes a duty on the official to impose the sanction. Generally, "[t]he imposition of the sanction [by an official] is commanded [*geboten*] . . . if its nonimposition is the condition of a sanction. Where this is not the case, the sanction is only authorized [*ermächtigt*], not commanded."³⁵

The result, then, is that the satisfaction of the conditions of the hypothetical legal norm marks, in every case, a conferral of power on a legal official, *but not necessarily a command*.³⁶ But if so, Hart's criticism of Kelsen might well be turned on its head. That is, to pursue Hart's critique, namely that Kelsen's hypothetical norm "distorts" the law by emphasizing one function of the law at the expense of others, would require the interpretation that Kelsen has unduly emphasized the *power-conferring* function of the law, not the duty-imposing function.

But all of this talk about which function of law is to be

33. REINE RECHTSLEHRE, *supra* note 19, § 4(b).

34. *Id.* § 18.

35. *Id.* § 5(a).

36. See J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 77-85 (1970). *Contra*, R. MOORE, LEGAL NORMS AND LEGAL SCIENCE 112-46 (1978).

emphasized is, in the case of Kelsen, misleading. For it suggests that Kelsen, like Austin, offers but a single legal function while Hart offers several. In fact Kelsen offers separate functions within a single, composite norm, while Hart offers separate functions associated with separate norms. And Hart has given us no reason to prefer his scheme over Kelsen's.

II. HONORÉ'S "PROFESSIONAL" TAXONOMY OF RULES

Whatever one makes of the philosophical exchange between Hart and Kelsen, pitched as it is at a very abstract level, Hart is no doubt right when he remarks that "[a] fully detailed taxonomy of the varieties of law comprised in a modern legal system" (as distinct from his own taxonomy in terms of two norm-types) "still remains to be accomplished."³⁷ A.M. Honoré, in his important *Festschrift* paper, "Real Laws," develops some of the details of a taxonomy of the varieties of law.

Honoré's paper is prompted, in part, by his sharp reaction to the idea, evident in the work of Jeremy Bentham and of Honoré's Oxford colleague (and co-editor of the *Festschrift*), Joseph Raz, that behind the statutes and judicial decisions of the positive law lie more fundamental "'logical' or 'ideal' legal units" that are "the ultimate furniture of the legal universe" (p. 100). As Raz puts it (quoting at several points from Bentham):

The discovery that a law is not identical with a statute or a section in a statute etc., that many statutes from all the branches of the law, including civil as well as penal law contribute to the content of every law, was the most important turning-point in Bentham's thinking on legal philosophy. This discovery and the problems it raised were crystallized in one central question: "Wherein consists the identity and completeness of a law?" And again "What is a law? What are the parts of a law? The subject of the questions, it is to be observed, is the *logical*, the *ideal*, the *intellectual* whole, not the *physical* one: the *law* and not the *statute*."³⁸

In Bentham, the idea that the law is ultimately to be understood within a framework of "real entities" more fundamental than the "physical laws" of the statute books and judicial reporters is spelled out in terms of two principles: first, that every law imposes duties (to act or to forbear from acting) and second, that

37. THE CONCEPT OF LAW, *supra* note 7, at 32.

38. J. RAZ, *supra* note 36, at 71, quoted at p. 100 (citing J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 122, 429 (J.H. Burns & H.L.A. Hart eds. 1970)) (emphasis, here and in subsequent quotations, is in original) (footnotes omitted).

act-situations provide the basis for the individuation of legal norms, which is to say that "every act-situation governed by the law is the core of a separate law" (p. 103).

Honoré regards the effort to distinguish or individuate legal norms according to Bentham's principles as a "wild-goose chase" (p. 100). He rejects the notions that all laws impose duties and that laws are individuated by appeal to the principle of act-individuation. Arguments against the first of Bentham's principles are familiar from Hart's *The Concept of Law*, in which, as we have seen, power-conferring rules are developed as a distinct type of legal rule, a type not reducible to duty-imposing rules. But Bentham's second principle, namely that act-situations provide the basis for the individuation of legal norms, has received less attention. Raz addresses the question of individuation in his *The Concept of a Legal System* (1970), contending that a primary function of the law is to guide behavior and that this function is seen more clearly if legal norms are formulated so as to reflect it.³⁹ Honoré disagrees with both contentions. The main function of the law is "to strengthen the motives which citizens have to obey certain prescriptions in certain situations," and, in any case, the actual form of a law is not deducible from its function (p. 104).

Although Bentham's enterprise is wrongheaded, Honoré continues, it does not follow that a classification of legal rules is without value. Discourse and argument in the law require a modicum of conceptual order, that is, a scheme of legal categories and a classification of rule-types, and these requirements of professional—as distinct from philosophical—discourse prompt Honoré to offer his own classificatory scheme. He begins with two formal properties of legal rules. The first is generality, a property he draws from our understanding of "rule" as something that by its nature can be applied repeatedly. (One may contrast "rule," here, with "ruling" and "holding"; neither of the latter is general.) Honoré recognizes exceptions to his claim that generality is a formal property of legal rules, for example, "existence laws" establishing a particular legal practice or institution ("there shall be a Crown Court in England and Wales which shall be a court of record," Courts Act 1971, §4(1) [p. 108]), but with virtually all other rules, including legal definitions and interpretations, generality is fundamental. A second property of legal

39. J. Raz, *supra* note 36, at 145, quoted at p. 103.

rules, Honoré says, is the possibility of arguing for an exception to the rule, even if no exception has been recognized heretofore (pp. 108-09). Here he appeals to the familiar idea that the law "requires a margin of flexibility" in order to adapt to changing conditions (p. 110).

The next step in developing a legal classificatory scheme based on professional, not philosophical, requirements is a statement of the various rule-types. Here Honoré is at his best. He conceives of his task as showing how the law transforms "the data of ordinary life into those of a special drama with its own personages, costumes, and conventions" and how the law also invents "new personages and relationships not found in the state of nature" (p. 112). As he sees it, there are six classes of laws:

1. *Existence laws* create, destroy, or provide for the existence or non-existence of entities.
2. *Rules of inference* provide how facts may or must or should preferably be proved and what inferences may or must or should preferably be drawn from evidence.
3. *Categorizing rules* explain how to translate actions, events, and other facts into the appropriate categories.
4. *Rules of scope* fix the scope of other rules.
5. *Position-specifying rules* set out the legal position of persons or things in terms of rights, liabilities, status, and the like.
6. *Directly normative rules* (which are few in number but important) guide the conduct of the citizen as such. [P. 112]

An example illustrating what Honoré has in mind may be drawn from classes 1, 3, and 5. An "existence law," mentioned above as an exception to Honoré's formal property of generality, prescribes "that there is a legal interest in land known as an estate in fee simple in possession. A categorizing rule specifies how such an interest may be acquired, transferred, or lost. A position-specifying rule prescribes what the legal position (rights, liabilities, etc.) of the holder of the fee simple in possession is" (pp. 112-13).

All of this is suggestive, and if Honoré can develop the classificatory scheme beyond these bare outlines, the result, a far more discrete picture of the structure of laws than is presently available in the literature, will be welcome indeed. Still, I think Honoré could have said all he wants to say on the classification of rule-types without his dubious criticism of Bentham and Raz on individuation. The rationale for a program of individuation is determined by the problems that may be resolved thereby, and it is hard to see how an out-of-hand rejection like Honoré's has any point. Suppose one were to contend that no logical relations exist

between legal norms, while conceding that the internal structure of a given norm can be understood in terms of logical relations. Hans Kelsen, for example, makes just such a contention in his later work.⁴⁰ By appealing to a doctrine of individuation, one may be able to assess Kelsen's claims, since the doctrine, properly developed, would provide a means of determining where the internal structure of a given norm leaves off and that of the next begins. More precisely, it would enable one to develop a criterion of identity for legal norms independently of what one knows about the logical relations between norms or between parts of norms. It is not obvious that a doctrine of individuation requires what Honoré attributes to Bentham, namely a "belief in metaphysical legal units" (p. 107); and without a doctrine of individuation, certain basic questions in legal philosophy are difficult, perhaps impossible, to answer.

III. MACCORMICK'S DEFENSE OF THE INTEREST THEORY OF RIGHTS

If the topic of legal rules dominated work in the philosophy of law for the decade following publication of *The Concept of Law*, it has recently yielded to questions about legal rights, a shift owing in no small part to Ronald Dworkin's work.⁴¹ While Dworkin's interest in rights is largely normative, the traditional British interest in rights remains conceptual. That is, while Dworkin is primarily concerned with questions about the justification of rights, the British are concerned with the venerable philosophical question of what rights are. To be sure, interest in the normative on the one hand and in the conceptual on the other are not mutually exclusive. Attention to conceptual questions about rights is evident in some of Dworkin's work,⁴² and recent British writers, among them D.N. MacCormick, are giving greater consideration to normative questions.⁴³

Two conceptual theories of rights compete for favor in con-

40. On Kelsen's categorical denial of logical relations between legal norms, see his paper, *Law and Logic*, in H. Kelsen, *ESSAYS IN LEGAL AND MORAL PHILOSOPHY* 228-53 (O. Weinberger ed., P. Heath trans. 1974). On the complex structure of so-called complete legal norms (*vollständige Rechtsnormen*), see REINE RECHTSLEHRE, *supra* note 19, §§ 6(e), 35(d); R. WALTER, *DER AUFBAU DER RECHTSORDNUNG* 17-19 (2d ed. 1974).

41. See references at note 12 *supra*.

42. See, e.g., R. DWORKIN, *supra* note 12, at 188-89, and the critical rejoinder in Finnis, *supra* note 12, at 382-85.

43. See MacCormick, *Children's Rights: A Test-Case for Theories of Right*, 62 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 305 (1976); MacCormick, *The Obligation of Reparation*, 78 *PROC. ARISTOTELIAN SOC.* 175 (1978).

temporary British discussions—first, the interest theory, which numbers Jeremy Bentham and Rudolph von Jhering among its proponents, and which focuses on the interests or benefits that accrue to the right-holder by virtue of the right; and, second, the will theory, adumbrated by John Austin (among others), which focuses on the preëminence of the will of the right-holder over that of the duty-bearer. D.N. MacCormick vigorously defends the interest theory in the *Festschrift*, while Hart himself, in a paper written for the *Oxford Essays in Jurisprudence (Second Series)*, develops and defends a version of the will theory.⁴⁴

Hart's critique of the interest theory on the well-known point of superfluity and his defense of the will theory against the same charge are helpful in distinguishing between the theories generally. In Hart's words,

if to say that an individual has . . . a right means no more than that he is the intended beneficiary of a duty, then "a right" in this sense may be an unnecessary, and perhaps confusing, term in the description of the law; since all that can be said in a terminology of such rights can be and indeed is best said in the indispensable terminology of duty.⁴⁵

The will theory, on the other hand, is not vulnerable to the charge of superfluity. As Hart argues, the terminology of rights is distinguished from the terminology of duty by appeal to the preëminence of the right-holder's will. The right-holder has a number of "legally protected choices" *vis-à-vis* the duty-bearer. For example, right-holder *A* may choose not to require *B*'s performance, may waive enforcement of *B*'s duty in the event of a breach, or, after a judgment favorable to *A*, may waive *B*'s obligation to pay compensation.⁴⁶

To treat the right-holder as having legal power or control over the duty-bearer requires, however, that the application of the will theory be limited for the most part to private law. Broader application of the theory gives rise to obvious counter-examples, as, for instance, in the criminal law, where one does not have power to

44. Hart, *Bentham on Legal Rights*, in *OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES)* 171-201 (A.W.B. Simpson ed. 1973).

45. *Id.* at 190, *quoted at* p. 199. That Bentham regards a terminology of rights as superfluous is suggested in such passages as the following: "An act is a real entity: a law is another. A duty or obligation is a fictitious entity conceived as resulting from the union of the two former. A law commanding or forbidding an act thereby creates a duty or obligation. A right is another fictitious entity, a kind of secondary fictitious entity, resulting out of a duty." J. BENTHAM, *OF LAWS IN GENERAL* 293-94 (H.L.A. Hart ed. 1970).

46. Hart, *supra* note 44, at 192.

release another from legally-imposed duties. Hart recognizes the limits of the will theory. He invokes the old Austinian distinction between the "relative" duties of the private law (duties reflecting correlative rights) and the nonrelative or "absolute" duties of the criminal law, and limits his application of the will theory to the former.⁴⁷

MacCormick, effectively criticizing the will theory, makes the most of its limitation to private law. In particular, he argues that the inability of the will theory to account for certain rights *qua* immunities is a grave defect. Some immunities, for example, one's immunity from being divested of ownership, are waivable by the right-holder. On the other hand, immunities in public law, for example, one's right of free speech, are not waivable. If *A*'s right of free speech is analyzed in terms of (i) the state's disability to interfere with *A*'s speaking out (excepting, of course, cases of the shouting-"fire"-in-a-crowded-theatre variety) and (ii) the state's disability to change the relation at (i), even with *A*'s consent, then *A* has no power to waive his right to free speech. Such rights *qua* immunities, familiar in the Western democracies as constitutionally protected rights, are commonly regarded as the most fundamental of rights. Yet according to the will theory, they are not rights at all. Or at any rate, the very possibility of giving any account of them is precluded. In MacCormick's pointed words,

it appears that [the constitutionally protected right *qua* immunity], be it ever so advantageous from the point of view of securing liberty, is so forceful as to thrust liberty beyond the realm of 'right' altogether. If there be no power to waive or assert the immunity, the claim, or whatever, upon some matter, upon that matter there is, *by definition*, no right either. [P. 196]

Having thus criticized the will theory, MacCormick develops the rudiments of an interest theory that is, he argues, not vulnerable to Hart's charge of superfluity. MacCormick's critical argument turns on an analysis of a problem about succession, a topic that the nineteenth-century classical legal positivist, Sir William Markby, introduces in these terms:

a man carries about with him (so to speak) a vast mass or bundle of rights and obligations, which are attached to himself, in the sense that they are conceived as binding *him* or belonging to him. . . . What becomes of these rights and obligations when the person dies to whom they are attached? Do they also perish? If not,

47. See *id.* at 191-95.

on whom do they devolve? That is determined by . . . the law of succession.⁴⁸

One aspect of the topic introduced by Markby, namely intestate succession, is dealt with in section 2(1)(a) of Scotland's Succession Act (1964): "Where an intestate is survived by children, they shall have right to the whole of the intestate estate." (Quoted at p. 200.⁴⁹) MacCormick uses the Act as the basis for arguing that the right in question may vest before the corresponding duty does and that the right may even serve as the "ground" of the duty. Both his first conclusion, the temporal priority of the right, and his second, its logical priority, count against the charge that the interest theory is redundant. That is, if the right is temporally or logically prior to the corresponding duty, it cannot be understood solely in terms of the duty, and the interest theory—at least on that score—is vindicated. Of course the latter of MacCormick's conclusions, that of logical priority, is far stronger than that of temporal priority, for temporal priority leaves open the possibility of logical *non*priority, precisely what logical priority, if correct, rules out. However, while MacCormick's conclusion of logical priority may indeed be correct, I believe that his argument for logical priority fails.

How, exactly, does MacCormick proceed? When a person dies intestate in Scotland, the right to the "intestate estate" automatically vests in the surviving children. This vesting is itself sufficient to establish MacCormick's first claim, for the vesting of the right to the estate, as recognized in the 1964 Act, may be said to be temporally prior to the vesting of any correlative duty in the executor. At the moment the right vests, the executor has not yet been appointed.

MacCormick goes on to claim that such a right may be understood as a "ground" for appointment as executor of the estate—appointment, that is, as duty-bearer. Why? Because the Succession Act indicates that as right-holders the surviving children are the prime candidates for appointment as executor. That is, "one of the intestate's children may, *because of this right conferred on him by the Act*, have a resultant preferential right to be [appointed] as executor" (p. 201). MacCormick concludes that because the right is a ground for appointment, it is "logically prior" to the corresponding duty. As he puts it,

48. W. MARKBY, *ELEMENTS OF LAW* § 771 (6th ed. 1905).

49. Succession (Scotland) Act, 1964, § 2(1)(a).

the vesting of the right in a given individual is a ground for confirming him in that office to which is attached the duty correlative to the like rights of his brothers and sisters; so that in this context right is logically prior to duty as well [as temporally prior]. [P. 201]

The argument MacCormick offers for logical priority is, however, problematic. He properly distinguishes, in the 1964 Act, between (i) *the vested right of the surviving children to the estate* and (ii) *the "preferential right" of the surviving children to appointment to the office of executor*. Moreover, he shows that there is a relation of presupposition here; that is, (ii) presupposes (i). The analysis calls, though, for an additional distinction, namely between (ii) *the "preferential right"* and (iii) *the duties attaching to the office of executor*. Here MacCormick encounters difficulties. They stem, I believe, from his failure to see that the duties attaching to the office of executor are not correlative to the "preferential right" of appointment to that office. That is, while the "preferential right" of an individual, say A, to appointment as executor presupposes that a right to the estate has vested in A, the relation concerns only the question of who will be appointed executor, not what the executor, once appointed, is to do. If the duties attaching to the office of executor were correlative to the "preferential right" to that office, then one could show a second relation of presupposition, namely (iii)'s presupposing (ii), just as (ii) presupposes (i). Given both these relations, then the missing link, (iii)'s presupposing (i), establishing the "logical priority" of (i) over (iii), would follow by appeal to the logical law of transitivity. In the 1964 Act, however, the duties of the executor are defined *independently* of both the vested right and the "preferential right." As MacCormick himself puts it, one's appointment as executor "will in turn result in his incurring the duties of executor, including the duty of distributing the intestate estate to those (including himself) who have right thereto under section 2(1)(a) of the 1964 Act" (p. 201).⁵⁰ The argument that the vested right to the estate is "logically prior" to the correlative duty is, therefore, unsound.

It does not follow, of course, that MacCormick's conclusion is false; I claim only that he has not shown it to be true. As I suggested above, some support for his position may be had by

50. See *id.* § 2(1)(a) (vested right), § 5(2) ("preferential right"). Various sections of the act that define the duties of the executor are summarized in M. MERTON, *THE SUCCESSION (SCOTLAND) ACT OF 1964* (2d ed. 1969), cited at p. 200.

appeal to the notion of the temporal priority of the right, and it may well be possible to construct an argument for its logical priority too. Such an argument would be welcome, for MacCormick's approach to the general conceptual problem of rights is a promising one. For example, he uses in a suggestive way Bentham's notions of "investitive" provisions (establishing the conditions whereby a right vests in qualified individuals), "consequential" provisions (establishing the various normative protections enjoyed by right-holders), and "divestitive" provisions (establishing the conditions whereby a right is transferred or "lost") (p. 207).⁵¹ More generally, he begins with legal rights rather than with the quasi-logical notions familiar from analytical jurisprudence, an approach that enables him to take account of what is actually understood in the law by the language of rights. In this respect his approach is not unlike Honoré's, who, as we have seen, develops a "professional" taxonomy of rules, rather than a philosophical one. As a point of departure, a perspective from within the law, on rights as on rules, is necessary if we are to arrive at a more refined, discrete analysis of these notions. Finally, in developing a broad, interest theory of rights, MacCormick's work holds open the prospect of a truly general theory; his own criticism of the will theory stems from the conviction, entirely justified in my view, that it is too narrow.

What about Hart? His contribution to the analysis of legal rules is well known, and he has made a fundamental, if less obvious, contribution to the study of legal rights too. Aside from his stimulating defense of the will theory, which prompted MacCormick's own paper, it is Hart who has generated widespread interest in the legal philosophy of Jeremy Bentham—through his editorial labors⁵² and through a number of important papers.⁵³ Since it is Bentham's interest theory of rights that MacCormick de-

51. See MacCormick, *Law as Institutional Fact*, 90 LAW Q. REV. 102, 106-08 *passim* (1974) (Inaugural Lecture, University of Edinburgh).

52. Hart has edited J. BENTHAM, COMMENT ON THE COMMENTARIES and A FRAGMENT ON GOVERNMENT, *supra* note 9; J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 38; J. BENTHAM, OF LAWS IN GENERAL, *supra* note 45.

53. *Bentham and the United States of America*, *supra* note 9; *Bentham and the Demystification of the Law*, 36 MOD. L. REV. 2 (1973); *Bentham on Legal Rights*, *supra* note 44; *Bentham on Legal Powers*, 81 YALE L.J. 799 (1972); *Bentham's "Of Laws in General"*, *supra* note 13; *Bentham on Sovereignty*, 2 IR. JUR. 327 (1967), reprinted in JEREMY BENTHAM—TEN CRITICAL ESSAYS 145 (B. Parekh ed. 1974); *Beccaria and Bentham*, ATTI DEL CONVEGNO INTERNAZIONALE SU CESARE BECCARIA, Accademia delle Scienze di Torino (Memorials of the Academy, ser. 4a, no. 9, 1966); *Bentham*, 48 PROC. BRIT. ACAD. 297 (1962), reprinted in JEREMY BENTHAM—TEN CRITICAL ESSAYS, *supra* at 73.

fends (just as it is Bentham's theory of individuation to which Honoré reacts), Hart's legacy to jurisprudence is conspicuous in the *Festschrift* papers not only from his own work, but from this resuscitation of the greatest of his intellectual ancestors.