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## Metaphors and Models of Law: The Judge as Priest

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# METAPHORS AND MODELS OF LAW: THE JUDGE AS PRIEST

*Philip Soper\**

## I. INTRODUCTION

The reasons that prompt people to try to identify laws or legal systems in advance of encounter are varied. One is that laws, though less concrete than chairs, are equally capable of posing obstacles to conduct: they can be stumbled over. If the desire to avoid such contact were the sole reason for trying to decide "what law is," Holmes' aphorism would work fairly well: by predicting judicial decisions and calculating the likelihood of avoiding accompanying sanctions, one could play a good game of "bad man's" bluff around legal obstacles to chosen courses of action.

The claim that law is identified by more than this predictive aspect arises when one takes into account the perspective of individuals other than Holmesian "bad men"—the judge, for example, who looks to the law as a guide for, rather than a prediction of, his decision;<sup>1</sup> or the individual who believes that valid norms yield obligations whether or not they are accompanied by sanctions.

This variety of perspectives from which to view a phenomenon as complex as that of law<sup>2</sup> poses a problem for the legal theorist. Unlike individuals within the society, the theorist stands outside particular legal systems, seeking features that distinguish such systems from other social phenomena that they resemble. Like the sociologist or scientist, the legal theorist has no apparent interest other than that of conceptual clarity. But this attempt at "neutral" definition often meets with two objections. First, the theorist may be told that the claim that certain features of law are more important or more the "essence" of law than any other is essentially arbitrary—all depends on perspective. Second, he may be told that disputes about whether certain social structures are or are not "legal systems"

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1. See H. HART, *THE CONCEPT OF LAW* 10-11 (1961).

2. Roscoe Pound, for example, associates distinct views of law with the perspective of individual, judge, lawyer, teacher, lawmaker, and entrepreneur. See R. POUND, *II JURISPRUDENCE* 130-31 (1959).

resemble disputes about whether a loveseat is a chair or a couch: what is important is not the classification, but the description of similarities and differences that might make distinct objects suitable or unsuitable for various purposes.

Both objections can be avoided if the theoretical enterprise is less ambitious—if one is content, for example, to describe prominent features of legal systems without concern for whether the description is also part of the definition of law. This essay takes this less ambitious route in comparing four models of law with respect to their treatment of one particular legal phenomenon: the concept of legal obligation. Normative statements to the effect that one “ought” to obey the law, or that judges “ought” to apply one standard rather than another, are so commonly made within legal systems that most theorists attempt to account for this feature in the course of developing a general theory of law. Three such accounts that are examined in this essay are drawn from theories of law developed by legal positivists. The fourth is not. The fourth account anticipates a model of law that lies somewhere between those developed by legal positivists on the one hand and by natural law theorists on the other. This fourth model finds the “essence” of a “legal” system in the fact that the officials who accept and enforce the system *believe* that its fundamental laws are just.

I shall not attempt to prove that the view of legal normativity entailed by one of these models is preferable to the others as more or less “essential” to the concept of law. In that sense, the essay is a preliminary step in the development of a definition of law. At the same time, I hope that the distinct view of obligation that emerges from each theory will facilitate intuitive comparisons of each description with the actual phenomenon of legal obligation as perceived by most subjects in particular legal systems. This comparison of description and phenomenon should provide at least a starting point for determining which view, if any, is more accurate and which, if any, is necessarily linked to the concept of law itself.

The limited goal of this essay is accompanied by three additional limitations in scope and method. First, the essay is concerned primarily with the connection between legal theory and legal obligation as it appears from or is ascribed to the role of the judge. The justification for this limitation in perspective builds on two basic intuitions underlying the claim that “law-applying” rather than “law-creating” institutions are central to the understanding of law.<sup>3</sup> The first in-

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3. See J. RAZ, PRACTICAL REASON AND NORMS 129-31 (1975).

tuition is that the goal of the judge, however unobtainable or unrealistic in practice, is ideally to "find" rather than to "make" the law. To that extent the purpose of the judge and the legal theorist overlap: each is the ally of the other in attempting to discover neutral features that identify law in general, although the judge is also concerned with applying the general theory to identify the specific norms of his particular legal system. The second intuition, shared by legal realists and recent positivists alike, is that there is a connection between efficacy and legal validity that requires one to focus primarily on law as it is applied and accepted in practice rather than as it is announced. To identify a system and its norms as legal where none of the norms are observed in fact is to so exalt theory over practice as to ignore the phenomenon for which the theory was initially supposed to account.

A second limitation of this essay is that it does not attempt to analyze or distinguish the concepts of "obligation" or "duty" or "norm" within the wider category of "ought" statements in general. That is to say, in distinguishing various descriptions of "legal obligation," I shall be distinguishing primarily the various reasons that a particular theory seems to accept as *prima facie* sufficient to explain (*from the viewpoint of persons within the system*) why one "ought" to obey the law or why a judge "ought" to apply a particular standard. These reasons may be self-regarding or other-regarding, prudential or moral. Whether "prudential oughts" are "norms" is thus a question with which I shall not be concerned, just as I shall also not consider the question whether one has a *prima facie moral* obligation to obey the law.

This essay is also characterized and necessarily limited by its reliance on the metaphor as a shorthand device for conveying the relation between a particular theory and the account of normativity that the theory seems to entail. Professor Max Black observes that "[to] draw attention to a philosopher's metaphors is to belittle him—like praising a logician for his beautiful handwriting."<sup>4</sup> Black proceeds, however, both to defend the philosophical use of metaphor and to suggest that the metaphor may convey cognitive content that cannot always be conveyed by nonmetaphorical translations.<sup>5</sup> I shall not explore or defend the use of metaphor here beyond noting that it is a technique to which Professor H. L. A. Hart, whose theory is a primary focus of this essay, also resorts in criticizing his positivist predecessor, Austin. Austin's theory of law, Hart suggests, is the "gun-

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4. M. BLACK, *MODELS AND METAPHORS* 25 (1962).

5. *See id.* at 44-47.

man situation writ large,"<sup>6</sup> to which Hart objects largely because of alleged defects in the resulting picture of legal obligation. One of the goals of this essay is to find an appropriate metaphor for Hart's own version of positivism. More particularly, this essay explores the following questions: What is the metaphorical role of the judge and the consequent view of legal obligation implied by the theories of the three major positivists—Austin, Kelsen and Hart? Is there a plausible alternative metaphor? What are the implications of the alternative for legal theory and the concept of legal obligation?

## II. FOUR MODELS OF LAW

### A. *Austin: The Judge as Henchman*

If Austin's view of law as the command of the sovereign is the "gunman situation writ large," the role of the judge presumably is that of a "henchman,"<sup>7</sup> carrying out or passing on the gunman's orders, backed by threats, to the subjects of the legal system. Austin, of course, prefers less pejorative descriptions. For him, the judge is the "minister" or "trustee" of the sovereign, who communicates the sovereign's orders or exercises tacitly or expressly delegated power to issue orders himself.<sup>8</sup>

Hart's criticism of this account is well known and frequently recounted. A theory that describes law as consisting essentially of orders backed by threats (henceforth, the "coercive model" of law) fails adequately to account for legal obligation. Under the coercive model, the minimally sufficient reason why one "ought" to obey the law is the purely prudential one of avoiding the threatened sanction. Hart concedes that legal systems may exist in which the private citizens in the system view law in just such exclusively coercive terms: the only reason to obey is to avoid punishment. But, he argues, there is at least one group of citizens in a legal system—namely the judges or officials—who view law as imposing *obligations*, rather than merely *obliging*. For this group, deviation from the accepted legal standards becomes the occasion for legitimate criticism. Within this group, reasons for following the law are presumably advanced which do not refer simply to threatened legal sanctions.<sup>9</sup>

Just what sorts of reasons for compliance such a group might ad-

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6. H. HART, *supra* note 1, at 7.

7. *See id.* at 19.

8. *See* J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 28, 142 & n.\*, 263-64 (London 1832).

9. *See* H. HART, *supra* note 1, at 79-88, 111-13.

vance will be considered below. My interest at this point is in the extent to which Austin's theory must be seen as thoroughly committed to the coercive model of obligation that Hart criticizes.<sup>10</sup> The difficulty in answering this question arises because Austin, in his lectures on the *Province of Jurisprudence Determined*, appears primarily concerned with accounting for the relationship between the sovereign and the ultimate subject of the sovereign's command—Hart's private citizen. It is not clear what Austin might have said if he, like Hart, had turned his attention to the phenomenon of obligation as it appears among the judges of the system.

The text of Austin's lectures provides some basis for supposing that Austin would not describe obligation among the judges of a system solely in terms of the coercive model. We have already noted that Austin refers to judges as the "ministers" or "trustees" of the sovereign. In discussing a sovereign's other political subordinates, also described as "trustees," Austin indicates that the terms of the trust may be enforced "by legal, or by merely moral sanctions. The [trustee] is bound by a positive law or laws: or it is merely bound by a fear that it may offend . . . in case it shall break the engagement which it has contracted with [the sovereign]."<sup>11</sup> Austin thus accepts the possibility that the conduct commanded of judges (application of the sovereign's laws) may not itself be coerced by a specific threat annexed to the command—a characteristic mark of all "laws" properly so called.<sup>12</sup>

This conclusion accords with the common observation that judges and officials in modern legal systems such as our own are often said to breach their official duties, even though no specifically legal punishment is provided for the breach.<sup>13</sup> If the coercive model of law is thus insufficient, even for Austin, to account for the attitude of judges in such legal systems toward the "orders" they are carrying out, how is such official obligation to be described? The question may be approached, despite Austin's sparse account, by referring to the basic metaphor of the judge as henchman. Among the reasons a henchman/judge might have for complying with the orders of a

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10. Hart admits, it should be noted, that Austin's concept of a "command" may not be reducible to the coercive model and that there may be other aspects of Austin's theory that are not fully consistent with the model. See H. HART, *supra* note 1, at 18-20. The point in the text is that even the gunman/henchman metaphor departs in some respects from the coercive model and does so in ways that make the henchman metaphor arguably applicable to the theories of both Austin and Hart.

11. J. AUSTIN, *supra* note 8, at 240.

12. See *id.* at 138-39.

13. See J. RAZ, *supra* note 3, at 158.

gunman/sovereign are the following:

- 1) The judge may comply because of a threatened legal sanction;
- 2) Absent the threat of a specific sanction, the judge may comply for other reasons of self-interest, ranging from the fear of being criticized or of incurring the sovereign's displeasure, to the desire to remain a henchman and enjoy the accompanying rewards of power, prestige, and comfort;
- 3) The judge may independently decide that the sovereign has a right to command for moral or other reasons.

All of these reasons for compliance, it is suggested, are consistent both with Austin's theory and with a view of the judge as henchman. If this suggestion is correct, it raises doubts, as we shall see, about the extent to which Hart's analysis in fact represents an advance upon the "gunman situation writ large."

### B. *Kelsen: The Judge as Logician*

In *The Pure Theory of Law*,<sup>14</sup> Kelsen rejects the coercive model of obligation for reasons that remind one of Hart's criticism of Austin:

Everybody understands that it is one thing to say: "This behavior is a delict according to the law and ought to be punished according to the law"; and quite a different thing to say: "He who has done this will probably be punished." . . . The legal statements that one ought to behave in a certain way cannot be reduced to statements about present or future facts, because the former do not refer to such facts, not even to the fact that certain individuals wish that one ought to behave in a certain way.<sup>15</sup>

Kelsen's response to the problem of accounting for or describing this noncoercive legal "ought" is like the logician's response to the problem of accounting for the axioms in a logical system: no such account is possible, at least not within the same system that includes the axioms. In this respect Kelsen's judge, who makes statements describing the conditions under which coercive sanctions *ought* to be applied, is like the logician: the validity of all such "ought" statements depends on their derivation from a basic norm—that one ought to behave as the constitution prescribes. The validity of this basic norm is not open to judicial question but is simply "presupposed."

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14. H. KELSEN, *THE PURE THEORY OF LAW* (1967).

15. *Id.* at 104.

Kelsen's theory has led to confusion and criticism on two counts. First, it has been suggested that the somewhat mystifying notion of "presupposition" can be replaced with a much simpler and more accurate account of the attitude of the judge toward the basic norm. The judge, unlike the logician, does not dispassionately posit the ultimate normative premise of the legal system that underlies his particular normative conclusions. Rather, his attitude toward the basic norm is one of personal commitment, belief, and acceptance. As Professor Hughes observes:

Christian morals may be said to rest on the presupposition that Christ was divine; but the existence of a community of Christians rests on people holding the *belief* that Christ was divine. In the same way the existence of a legal community, as opposed to a model code constructed for the private edification of the draftsman, can ultimately be analyzed only in terms of the actual attitudes and dispositions towards basic procedures of the persons who make up the community.<sup>16</sup>

Kelsen's theory may also be criticized for its inattention to the nature of the basic norm. Even logicians, after all, can provide extra-systematic or metatheoretical accounts of the primitives or axioms of their formal systems. Thus one might also expect Kelsen to discuss whether the basic norm is itself an "ought" proposition and, if so, what kind of an ought it is.

Commentators have suggested two distinct views of the nature of such a basic norm. According to the first, the basic norm asserts that the provisions of the constitution and the resulting legal system "ought" to be accepted because they are justified. On this view, one who accepts the basic norm does so because he believes it is (morally) "acceptable." For such persons "[t]he concepts of the normativity of the law and of the obligation to obey it are analytically tied together."<sup>17</sup> According to the second view, the basic norm asserts that the constitution ought to be accepted without regard to its merits. On this view the fact that the system is accepted by others is sufficient to explain the normativity of the law, even though there may be good reasons—reflected in other norms—for refusing to obey. Dr. Raz calls these two views, respectively, "justified" and "social" normativity.<sup>18</sup> He also suggests that Kelsen uses only the concept of justified normativity—*i.e.*, that the "ought" of particular

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16. Hughes, *Validity and the Basic Norm*, 59 CALIF. L. REV. 695, 703 (1971).

17. Raz, *Kelsen's Theory of the Basic Norm*, 19 AM. J. JURIS. 94, 105 (1974).  
See *id.* at 103.

18. *Id.* at 103.

judicial decisions and the basic norms they "presuppose" reflect a judicial belief that the system itself is justified.

There is another possible interpretation of Kelsen, however, that does not restrict his theory to the concept of "justified normativity" and is at the same time more consistent with the metaphor of the logician and the language of presupposition that permeate Kelsen's writings. One may argue that Kelsen is committed to no particular concept of normativity on the part of those internal to the system. He is simply explaining the logical relationship between "ought" statements of *whatever kind* and the basic norm such statements presuppose. Whatever judges mean by the statement that sanctions "ought" to be applied, that is also the meaning that must be given to the basic norm. This view, for example, would find even the coercive model of law compatible with Kelsen's account. *If* judges believed that the basic norm "ought" to be accepted only because of threatened sanctions, then the "ought" statements of particular legal judgments would also reflect only the same prudential force. It is true that Kelsen seems to think most judges in most legal systems view the basic norm as justified, rather than as backed by threats, which explains why much of Kelsen's discussion is in similar terms: if judges claim sanctions are justified, it must be because for them the basic norm is also justified. But this claim is "in its character conditional and therefore hypothetical."<sup>19</sup> Kelsen, in short, may be viewed only as insisting, like Hume, that the normative force of particular legal judgments can only be as great as the normative force of the premises on which the judgment is based.<sup>20</sup>

Two passages in Kelsen's *Pure Theory of Law* may be used as illustrations. In the first, Kelsen, himself a moral relativist, considers the possible objection that "the concept of the 'ought' . . . is senseless or merely ideological fallacy":<sup>21</sup>

If all meaning is denied to the norm . . . then it would be senseless to say: "this is legally permitted, that is forbidden;" "this belongs to me, that to you;" "X is entitled and Y is obligated." The thousands of statements in which the law is expressed daily would be senseless. In contrast to this, the fact is undeniable that everybody understands readily that it is one thing to say: "A is legally obligated to pay \$1,000 to B," and quite another: "There is a certain chance that A will pay \$1,000 to B."<sup>22</sup>

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19. H. Kelsen, *supra* note 14, at 46.

20. See generally D. Hume, *TREATISE ON HUMAN NATURE*, book III, pt. I, sec. I (1739).

21. H. Kelsen, *supra* note 14, at 101.

22. *Id.* at 104.

It seems clear that Kelsen is here defending an objective concept of obligation against the moral relativist. But he is defending this concept on the assumption that it is the concept used by people within the system. In such cases, the fact that the legal *theorist*, when describing a system, believes "oughts" are senseless, does not mean that the objective sense of obligation is unimportant to those within the system or can be ignored in giving an accurate theoretical account of the phenomenon of law. It is because of his sensitivity to such possibilities that sociologists as well as philosophers can claim Kelsen as one of their own. But if the judges and officials of the system are themselves moral relativists, no objective "ought" will be presupposed. The system will not be viewed as normative, but it may still be legal. Kelsen's purpose, in short, may be primarily to account for the empirical fact that most legal systems are viewed by their officials as normative and objectively justified; but the claim that only such systems can be "legal" is a definitional claim that Kelsen appears to assume but does not explicitly defend.

A second passage that supports this interpretation may be found in Kelsen's comparison of a legal community and a gang of robbers. The only difference between the two, Kelsen suggests, is that in the coercive order of the terrorizing gang:

no basic norm is presupposed according to which one ought to behave in conformity with this order. But why is no such basic norm presupposed? Because this order does not have the lasting effectiveness without which no basic norm is presupposed. . . . [T]he coercive order regarded as the legal order is more effective than the coercive order constituting the gang.<sup>23</sup>

Kelsen in the same passage indicates that, if the gang should succeed in effectively establishing control over a certain territory, it would then become a legal system and a state.

The apparent implication of this passage is that a robber gang becomes a legal order for Kelsen, not because of any change in the internal normative attitude of the members of the gang, but simply by becoming able effectively to enforce its orders against nonmembers. The resemblance to Austin's theory of law, with effectiveness (habitual obedience) as the key to locating independent sovereigns and thus independent legal systems, is striking. One might, of course, suggest that Kelsen assumes that a normative, attitudinal change will occur within the robber gang as a result of increased effectiveness; *i.e.*, that Kelsen is making empirical claims about the psychological pre-conditions for adopting the necessary normative at-

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23. *Id.* at 47, 48.

titude. But this ascribes to Kelsen an intent to offer "social science stabs at the psychology of the law abiding citizen" that seems "outside the scope and interest of the pure theory of law."<sup>24</sup>

I do not intend to defend further this interpretation as Kelsen's own, but only to suggest that the interpretation is sufficiently plausible, given ambiguities in Kelsen's writings, that it compounds the confusion surrounding his theory of the basic norm. There are two points from the above discussion that I wish to emphasize. The first is that Kelsen's observation that judges in most legal systems believe that the system they administer is justified on its merits should be taken seriously by any legal theory that attempts to account for the phenomenon of legal obligation. The second is that whether this attitude is merely coincidental or is an essential aspect of the concept of law itself is not explicitly addressed and defended by Kelsen, although he appears to assume that the attitude *is* essential to "law." One major goal of this essay is to explain how Kelsen's assumptions might be coupled with a theory of law unhampered by the mystification that surrounds the metaphor of the judge as logician.

### C. H. L. A. Hart: *The Judge as Game Player*

Much of the discussion generated by Hart's book, *The Concept of Law*, has focused on the notion of a "rule of recognition," which, like Kelsen's basic norm, is Hart's ultimate test of legal validity. According to Hart, however, the existence of a legal system depends on two conditions. In addition to general conformity to the rules that are valid according to the rule of recognition, the rule of recognition must itself be *accepted* by certain members (at least the officials) of society. Hart introduces this notion of acceptance to correct problems we have noted in the theories of Austin and Kelsen. "Acceptance" is meant to correct defects in Austin's coercive model by providing a more adequate account of the obligatory nature of the law. It is also meant to replace Kelsen's "obscure" notion of presupposition<sup>25</sup> with a simple empirical reference to the actual practice of the courts and officials of the system.

Despite the key role that this concept thus plays in explaining legal normativity, Hart spends little time discussing the nature of "acceptance." What discussion does occur is in some respects at odds with Hart's careful analysis of rules and obligation and his account of the "internal attitude" that distinguishes following social rules

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24. Hughes, *supra* note 16, at 702.

25. See H. HART, *supra* note 1, at 245 n.1.

from habitual conduct and from behavior influenced solely by coercive threats. Consider, for example, the following:

Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily must conceive of themselves as morally bound to do so, though the system will be most stable when they do so. In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.<sup>26</sup>

Compare this passage with Hart's earlier explanation of what it means for a group to accept rules as a common standard of behavior. Such acceptance, he explains, involves

a critical reflective attitude to certain patterns of behaviour . . . [that] should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of "ought," "must," and "should," "right" and "wrong."<sup>27</sup>

How can Hart claim that the acceptance of rules as standards of behavior implies a demand for conformity expressed in the normative terminology of "ought" statements and at the same time claim that such acceptance may be based, for example, only on one's own self-interest in such rules?

One possible explanation is that in the first-quoted passage Hart is talking about the "motives" for acceptance in a psychological sense. The "reasons" Hart describes for accepting a legal system would then constitute a report of the causes of the group's behavior, rather than a description of the group's internal attitudes toward the rules they accept. But if this is the sense in which the passage is to be interpreted, it need not concern us here any more than in the case of Kelsen. Our concern is with what the fact of acceptance implies in terms of the group's own attitude toward the accepted standards, rather than with a psychological account of why these particular attitudes develop. Besides, Hart's claim that one can decide after examination of his conscience that he ought not to accept the basic standards of the legal system suggests that this passage is not meant purely as a psychological explanation of why such standards are accepted.

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26. *Id.* at 198-99.

27. *Id.* at 56.

A more plausible explanation is that Hart in both passages is willing to allow the normative terminology backing the demand for conformity to range over the full variety of "ought" statements, from the prudential ("you ought to put antifreeze in your car") to the aesthetic ("you ought not to wear a striped tie with that shirt") to the moral ("you ought not to steal"). This would explain why one can "accept" a legal system for reasons of self-interest, while admitting that there are good moral reasons for not accepting it.<sup>28</sup>

The trouble with this view is that if the normative language typifying "acceptance" is to range over any and all types of nonmoral "oughts," it becomes difficult to distinguish Hart's theory from Austin's. Imagine a legal system in which acceptance means no more than is suggested above by Hart. Rex and his judge/officials, who happen to have a monopoly on the state's coercive power, accept the rule that whatever Rex enacts is law. Their acceptance is based solely on the fact that Rex enacts laws which benefit himself and his judges at the expense of the rest of society. Rex even admits that morally his rules ought not to be accepted, but he and his officials continue to do so for reasons of self-interest. Presumably "obligation" in this system is found solely in the fact that officials who deviate from the accepted rules are met with the criticism that the rules are in the deviant's own self-interest—like explaining that one "ought" to put antifreeze in one's car.

It is true that on this model the allegiance of the officials is voluntary and based on an appeal to self-interest, rather than a threat of force. Thus, one cannot describe the system as working only by "obliging." But what is needed is an explanation of how the fact of voluntary allegiance by itself adds an adequate concept of "obligation" to the system. As noted in our discussion of Austin, "henchmen" officials need only have the same reasons of self-interest for continuing to carry out the gunman's orders. Even in the case of a single ultimate sovereign who issues orders backed by threats to all citizens, including officials, the sovereign's continued acceptance of his "right" to govern is presumably a voluntary one. Nor can the point be that as soon as a certain number of people (more than one) accept the system, one has an "obligation" in a sense one did not

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28. That this appears to be Hart's view can be seen from the following passage: Those who accept the authority of a legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals: "I (You) ought", "I (he) must", "I (they) have an obligation". Yet they are not thereby committed to a *moral* judgment that it is morally right to do what the law requires.  
*Id.* at 199.

before. Austin's model also contemplates the possibility that the sovereign might actually be located in a "partnership" of several individuals (as in the case of members of Parliament or the members of a ruling triumvirate). If moves of this sort are sufficient to avoid Hart's criticism of the gunman model, then the distinction between Hart's theory and Austin's begins to disappear.

It may be possible to view Hart's model as an advance over Austin's by distinguishing the *reasons* for accepting a rule from the *kind of criticism* that occurs when one deviates from the rule. At one point, in fact, Hart seems to suggest that the *kind of criticism* as well as the fact that criticism occurs is an identifying characteristic of rules of obligation, of which legal rules are a subclass. Such rules, Hart explains, are not only supported by serious social pressure, but are also "thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it."<sup>29</sup> This passage comes close to suggesting that the internal attitude of those who accept such rules is one of "justified normativity"—*i.e.*, that criticism is designed in part to remind one of the merits of the accepted rules. But this view contrasts sharply with Hart's insistence that rules can be accepted for reasons that have nothing to do with the merits of the rules: demands for conformity can presumably be made simply because the rules are accepted (for whatever reasons) by other members of the group.

One way to reconcile these passages, while at the same time distinguishing Hart's theory from Austin's, is to view the judge as one views the player of a game or the member of a social club. In the case of games, the "merits" of the particular rules of the game are irrelevant to the claim that one has an obligation to follow the rules when playing. One may believe, for example, that chess would be a better game without the provision for castling—indeed, that the provision is inimical to the true "spirit" or "purpose" of the game, which, one may think, is to encourage slashing attacks and middle-of-the-board king hunts. But even if one were correct in one's appraisal of what the game of chess is all about, one's obligation is to play by the accepted rules until they are changed by authorized procedures. Similarly, members of a social club may believe that rules of the club regarding, for example, admission standards for new members, are not only morally unjust but also inimical to the club's purposes. Failure to observe such rules will nonetheless be met with criticism until they are changed, regardless of the correctness of

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29. *Id.* at 85.

one's appraisal of the rules on the merits. In both cases what underlies such criticism is the *fact* that others accept a rule plus some reason (for example, tacit agreement to play by the rules) that explains why acceptance by some calls for compliance by others, regardless of disagreement about the merits of the accepted rules.

This view of Hart's theory explains why a judge may have many reasons for "accepting" the rule of recognition—for agreeing to play—ranging from self-interest to a belief that the "game" he is playing is morally justified. It also explains why the judge who fails to conform, whatever his reasons for accepting the rule of recognition, will face criticism of an arguably different sort from that which the judge as henchman faces. He must either follow the rules or get out of the game, resign from the club. If Austin's theory is the "gunman situation writ large," Hart's, as one commentator has observed, is "Monopoly writ large."<sup>30</sup>

#### D. *An Alternative View: The Judge as Priest*

If one turns from the narrow class of jurisprudential literature deliberately aimed at analysis of the concept of law to the broader class of legal literature in general, one soon discovers a persistent alternative view of the judge that casts him in the metaphorical role of a priest. Evidence of this view's persistence is furnished in part by the fact that it has long been the object of scornful attack by realists and positivists alike, eager to debunk the myth that lies behind the metaphorical image. The myth, presumably, is the idea, most often associated with natural law theories, that there is an essential link between law and justice, and that the judge's task, accordingly, is the secular equivalent of the priest's: both seek the normative standards that govern human conduct in ideals that transcend positive law or positive morality.

The "judge as priest" is not the only metaphor that expresses this idea. In a well-known passage, Blackstone refers to judges as "the living oracles" of the law.<sup>31</sup> Bentham, in response, makes no attempt to conceal his sarcasm in accusing "the great oracle of English jurisprudence" of "wandering in a labyrinth of rights and wrongs, and duties, and obligations and laws of nature, and other fictitious entities."<sup>32</sup> Austin is scarcely less constrained in attacking the view

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30. Noonan, Book Review, 7 NATL. L. FORUM 169, 177 (1962).

31. 1 W. BLACKSTONE, COMMENTARIES \*69. See also J. DAWSON, THE ORACLES OF THE LAW xi (1968).

32. J. BENTHAM, OF LAWS IN GENERAL 2 n.a (H.L.A. Hart ed. 1970).

of the Roman law compiler, Ulpian, that "[l]aw being the creature of justice, we the juriconsults may be considered as her priests, for justice is the goddess whom we worship, and to whose service we are devoted."<sup>33</sup>

Among modern writers, few have explored this notion of the "priestly power"<sup>34</sup> of courts more engagingly than Thurman Arnold. In *The Symbols of Government*, Arnold devotes several pages to a discussion of the analogy between law and theology: "Just as jurisprudence today is the ultimate justification of the ideal of a rule of law above men, so the theology of yesterday was the ultimate justification of a rule of a moral and logical god above men and even above governments."<sup>35</sup> Arnold, of course, finds much in reality that does not correspond to the ideal. At the same time, he is far more sympathetic than Austin or Bentham to the impulses of the "incurably romantic human race"<sup>36</sup> which seem to make it impossible to escape from or ignore this ideal element in the attitudes of people toward their fundamental legal institutions.

This latter observation suggests a second idea implicit in the metaphor of the judge as priest, an idea that does not require linking that metaphor solely to natural law claims connecting legal and moral validity. One may agree that standards can be identified as "legal," even though they cannot be justified on moral or other grounds, and yet see in the metaphor an attempt to express the idea that those who accept the fundamental norms of the legal system *believe* that the system is so justified. Expressed in the terminology we have been using in this essay, the metaphor at least suggests that the concept of obligation among those who accept the system is a concept of justified normativity. Nonconforming behavior will be met, ultimately, with critical reactions designed to show that the ultimate rule of recognition is justified on its merits and for that reason "ought" to be accepted.

A theory of law that made this description of the internal attitude of the officials of the system an essential aspect of the concept of law can be characterized in broad outline by contrasting the view of law that emerges from such a theory with Hart's view. First, the new theory agrees with Hart's in making the existence of a legal system dependent on the acceptance of the basic rules by at least the

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33. J. AUSTIN, *supra* note 8 (Library of Ideas ed. 1954), at 189.

34. T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 186 (1962); *see id.* at 206, 224.

35. *Id.* at 59.

36. *Id.* at 71.

officials of the system. But the theory adds the qualification that the officials must also in good faith believe (and claim) that these rules are acceptable (in the sense of being worthy of acceptance) by those who are subject to the system's rules.

Second, this claim of acceptability is essentially a moral claim—a claim that the rules have value for the group in question and thus *deserve* allegiance. The claim has a moral character because it is backed by showing that there are good reasons (which may be self-regarding or moral reasons) for all subjects to accept the system's norms.<sup>37</sup> Grossly characterized, the theory essentially links "law," not with "justice in fact," but with a "claim to justice" on the part of the system's officials.

Third, it is consistent with the theory that those who disagree with the attempted justification of the basic rules and do not accept the system may view the legal system as purely coercive—"obliging" rather than imposing obligations. Indeed, private citizens who believe that the implicit claim of acceptability is not made in good faith or is totally indefensible will perhaps be more outraged at the perceived hypocrisy of the system than they might have been if law made no pretense to be anything but coercive.<sup>38</sup>

Fourth, it is also consistent with the theory that judges who do not believe the system is justified may "accept" the role of judge and work within that role to change or subvert the system. It is not consistent with the theory that all judges may in this manner ignore the merits of the rules they accept, finding legal obligation solely in the fact that others have accepted the rules. Demands for conformity must be supported by more than simply pointing to the fact of acceptance. That kind of criticism, however valid in the case of a game, would not under this theory support a claim of legal obligation. The question of how many officials must believe the system is acceptable for it to be "legal" cannot be precisely answered any

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37. See K. BAIER, *THE MORAL POINT OF VIEW* 309 (1958).

38. Recent "political trials," in which defendants have attacked the legitimacy of the entire regime, provide additional evidence that this internal view of law is a persistent phenomenon. The response of the Supreme Court to attempts at trial disruption also illustrates how explicit the "claim to justice" on the part of a judge can be:

As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality, and religion. Being manned by humans, the courts are not perfect and are bound to make some errors. But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case.

Illinois v. Allen, 397 U.S. 337, 346-47 (1970).

more than Austin could say how extensive the habit of obedience must be or Hart could say how many officials must accept the rule of recognition. It is sufficient, perhaps, to suggest that those officials whose acceptance is necessary for the existence of a legal system must also claim that the system is acceptable.

Finally, it should be noted that the basic claim that must be made in a "legal" system under this theory is that the fundamental, constitutional design—the rule of recognition—is acceptable. Particular rules may arise that are difficult to justify or defend except on the ground that they are the product of a basic legal system that is itself worth preserving. In creating particular laws, one may, for example, often be unable to do more than consider all relevant competing interests in producing a compromise that completely satisfies no one. The only claim that need be made in such a case is that the lawmaking process remains an acceptable one, despite occasional substantive results that on the merits cannot be specifically justified.

### III. TOWARD A DEFINITION OF LAW

As an empirical matter it could probably be established that all four views of the internal attitudes toward legal obligation discussed above are held at various times and in varying degrees in all or most legal systems. The attempt to do more than this and to claim that one view is a necessary feature of the concept of "law" presents the problem discussed at the outset of this essay: why is it not enough simply to note these theoretical differences without worrying about whether a social order that did not include a particular concept of obligation should be classified as a "legal system"?

The answer to that question is beyond the scope of this essay, but it may be helpful to compare the theory that would result, assuming that the definitional problem could be resolved, with the theories we have been discussing. Kelsen, we have seen, seems to assume that the concept of justified normativity is an essential aspect of law, although he does not argue for it. The theory suggested here, then, may be viewed as an attempt to bring out from behind the veil of "presupposition" this implicit assumption in Kelsen's work.

The primary contrast to Hart's theory lies in the suggestion that legal systems cannot be satisfactorily analogized to the game model. To tell the judge who questions the rules of the system that his choice is to play by the rules or resign ignores the fact that, unlike the player in a game, the judge cannot escape. His choice is either to become

a private citizen and be "obliged" by the system or to agree to serve as a judge and thus incur the additional minimal obligation associated with the "tacit" agreement to play by the basic rules. Similarly, unlike a social club, legal systems do not purport to regulate the relations of members only. Their "rules" extend to nonmembers as well; indeed that is their primary purpose. To respond to the judge who asks why he ought to apply such rules with a reminder that those are the rules of the "club" ignores the real concern that prompts his inquiry: what justifies my imposition of the club's coercive power on nonmembers?

There remains, then, the contrast between the coercive model of law and a model that sees law as making an essential claim to justice. Implicit in the latter model is the suggestion that there are practical or theoretical advantages in distinguishing the primary means of effecting social control into three basic categories: coercive (organized sanctions alone); legal (organized sanctions plus a claim of acceptability); and moral (a claim of acceptability alone). I have been careful not to suggest that a definition of law that requires a claim of acceptability to be made imports substantive, moral tests into the definition. The minimum claim to legitimacy may after all be the Hobbesian one that any law is better than none, at least if minimum protections for person and property are provided. But it is doubtful that officials in modern states will be able to resort in good faith to the minimum Hobbesian justification for the basic rules they accept.

In this respect, the alternative view of law suggested here lies somewhere between that of the rigid, natural-law theorist on the one hand, who refuses to call unjust law "law," and the extreme positivist on the other, who refuses to withhold the name of law from norms that, no matter how unjust, can produce the proper pedigree. Under the view suggested here, the actual justice or injustice of a system of norms is irrelevant to the system's status as "legal," and to that extent, the theory is consistent with positivism. But the theory refuses to view legal systems and legal validity as a matter of pedigree alone. It requires officials to claim and believe in the justice of the system's basic rules, which then (and only then) converts the system into a "legal system," however unjustified in fact such claims may be thought to be. This demand that the officials pay heed to the moral acceptability of the system they enforce may well furnish some small theoretical, and no small practical, limitations on the ability of an official to issue commands and at the same time to appeal to respect for "the law" in urging obedience to those commands.