Routledge
Taylor & Francis Group

Jurisprudence
An International Journal of Legal and Political Thought

ISSN: 2040-3313 (Print) 2040-3321 (Online) Journal homepage: http://www.tandfonline.com/loi/rjpn20

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To cite this article: Stefan Sciaraffa (2015) Constructed and Wild Conceptual Necessities in Contemporary Jurisprudence, Jurisprudence, 6:2, 391-406

To link to this article: http://dx.doi.org/10.1080/20403313.2015.1044738

Jurisprudence, 2015
Vol. 6, No. 2, 391–406, http://dx.doi.org/10.1080/20403313.2015.1044738

REVIEWS

Constructed and Wild Conceptual Necessities in Contemporary Jurisprudence

A review of Luís Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's 'The Concept of Law'* (Hart Publishing, 2013) 318pp, Pbk £20.99, ISBN 978-1849463249.

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Reading HLA Hart's 'The Concept of Law' (*RCL*) comprises 13 contributions to a lecture series organised by graduate students at the University of Oxford. Each essay focuses on a single chapter of Hart's *The Concept of Law* (*CL*). Nine focus on chapters 2 to 10 of *CL*, respectively, and four focus on *CL*'s stage-setting first chapter. The editors have also included an extremely interesting and illuminating interview with Hart that has not previously been published in English ('the 1988 interview'). The resulting volume is a sophisticated and focused critical exploration of Hart's legal theory. Moreover, given the architectonic status of *CL*, these critical reflections also provide valuable recapitulations and extensions of some of the main lines of debate within contemporary general jurisprudence.

I have been tasked with reviewing not only this volume, but also the third edition of *CL*.[1] This edition includes a new editor's preface in which Leslie Green sketches Hart's core claims and forcefully responds to a number of criticisms, particularly

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1 Oxford University Press, 2012.

those offered by legal non-positivists. Green has also performed the invaluable service of appending a lengthy notes section that directs the reader to a number of landmark critical responses to various facets of *CL*. Given the volume and quality of the arguments contained in *CL*, Green's new preface, the 13 contributions to *RCL* and Hart's 1988 interview, I cannot possibly give all of this material the careful attention it deserves. Hence, I limit my focus to only some of the many noteworthy arguments and points of contention within these works. I hope this exercise will testify to my opinion that *RCL* and the new edition of *CL* demand the attention of anyone interested in the philosophy of law. Also, my selection of arguments for the purposes of this review is not innocent, for, as I now will explain, this review has an agenda of its own.

In his contribution to *RCL*, Timothy Endicott responds at length to Brian Leiter's recent criticisms of what Leiter terms the demarcation project within jurisprudence of identifying law's essential features (*RCL*, 31–34). Similarly, in his contribution to *RCL*, Fred Schauer sets his critical sights on theorists who seek to identify law's essential features, though he argues that Hart did not join in this misguided project (*RCL*, 245). Because the common philosophical understanding is that any object's essential features are its metaphysically necessary features—ie those features an object has by virtue of itself and irrespective of the way we conceptualise or talk about the object—it would seem that Leiter and Schauer attribute to legal theorists the project of identifying metaphysically necessary truths about law.[2]

I agree that Hart and contemporary legal theorists are engaged in some sort of demarcation project, for, as I will explain in some detail below, Hart and contemporary legal theorists make numerous claims about law's necessary features. However, *contra* Leiter and Schauer, I do not construe these claims in terms of metaphysical necessity, for a number of reasons. First, such a construction would be highly uncharitable given that the idea of metaphysical necessity is vexed and contentious as applied to any object, yet no legal theorist has staked out a plausible account of such necessities in general or as applied to law specifically. That is, no legal theorist has offered a plausible account of how to separate those features that the objects that we refer to using the term 'law' (or 'legal system', 'legal obligation', 'legally valid', and so on) have by virtue of themselves as opposed to those they have by virtue of the way we conceptualise them. Second, at least some of the leading theorists who refer in earnest to law's essential properties or fundamental nature purport to engage in a kind of conceptual analysis in order to identify those features, thereby suggesting that they are in pursuit not of law's metaphysically necessary features, but rather of features that are true of law by virtue of the way we talk about or conceptualise the law.[3] Third, as I argue below, a viable alternative reading interprets jurisprudential modal claims in terms of conceptual necessity.

2 See eg Tuomas E Takho, http://philpapers.org/browse/essentialism-and-de-re-modality.

3 See eg Joseph Raz, 'On the Nature of Law' (1994) 82 *Archiv fur Rechts-und Sozialphilosophie* 1, reprinted in *Between Authority and Interpretation* (Oxford University Press, 2009) 98. 'All this puts a gloss on the meaning of the claim that legal theory aims to provide an account of the essential features of law … Legal theory is merely the study of the necessary features of law, given "our" concept of law.' See also Scott Shapiro, *Legality* (Harvard University Press, 2011), (n 5) 405. 'The terminology "conceptual

Stock illustrative examples of conceptual necessities include 'All vixens are foxes' and 'All bachelors are unmarried'. The core idea is that statements such as these are necessarily true by virtue of their meaning alone. I propose that we gloss jurisprudential modal claims as claims of this sort. For example, I would gloss Hart's claim that there is no necessary connection between law and morality as the claim that the statement 'If something is law, it is moral' might be true, but it is not true solely by virtue of its meaning.

One worry about the conceptual reading is that although the notion of conceptual necessity is at first blush intuitively plausible, it too is contentious, for some doubt the philosophical utility if not the coherence of conceptual modality.[4] Obviously, I cannot adjudicate these issues here. However, there are many defenders of the coherence and philosophical utility of conceptual modality, and I hope that the discussion will make a small contribution to this defence.[5]

A second worry is that although the conceptual reading of the jurisprudential demarcation project does not saddle legal theorists with implausibly sublime claims about the metaphysically necessary features of law, it risks casting the last half-century of jurisprudential debate as a series of ridiculous conceptual disputes. I argue that far from being ridiculous, much contemporary analytic jurisprudence can be readily construed (irrespective of whether all parties to the debate have construed things this way) as a series of interesting and important debates that revolve around two different kinds of concepts.

One line of debate is about the necessary and sufficient conditions that ought to be affixed to the constructed concept of a legal system in order to illuminate the social institutions within the observational purview of legal theorists. A second line addresses, at it were, a wild concept—namely, the concept that animates the law-recognising behaviour of legal officials. As I shall explain below, there is little factual disagreement among the parties to the first line of debate; rather, this debate is largely a dispute about the appropriate desiderata for constructing a concept that best illuminates the relevant set of social institutions. By contrast, the debates that pertain to the wild concept can be readily characterised as

analysis" is slightly confusing insofar as it might suggest that the object of analysis is a concept, rather than entities that fall under the concept. As I will be using the term, however, it denotes a process that uses a concept to analyze the nature of the entities that fall under it.'

4 See eg Timothy Williamson, *The Philosophy of Philosophy* (Blackwell, 2007).

5 Although I do not think the arguments here rely on this account, the idea of primary intensions familiar from two-dimensional semantics has guided my thinking about conceptual modality as applied to jurisprudence. See eg David Chalmers, *Constructing the World* (Oxford University Press, 2012). According to Chalmers, the primary intension of a sentence (or thought) maps its epistemically possible scenarios to truth-values, and a sentence is *a priori* (for present purposes, a conceptual truth) 'iff its primary intension is true in all scenarios' (237). Similarly, the primary intension of a subsentential expression (for present purposes, a concept), such as 'law', 'legal system', or 'legally valid norm', is a function from epistemically possible scenarios to a set of individuals. A felicitous feature of Chalmers' account of conceptual modality (but not only Chalmers' account) is that these functions need not be structured as definitions. For example, the concept 'vixen' might be structured as a definition that fixes what individuals are vixens. By contrast, to describe just one possible non-definitional alternative, the concept 'knowledge' might be structured in terms of the deliverances of reflective equilibrium reasoning as applied to a set of intuitions about what counts as knowledge. *Ibid*, 16–18.

empirical disputes about the structure and content of the concept that animates the behaviour of legal officials. To make my case, I begin with my gloss on Hart's modal claims about legal system and legal obligations as set out in *CL*, as supplemented by the 1988 interview, before turning to a number of the *RCL*-contributors' critical responses.

1. HART'S CONCEPTS OF LEGAL SYSTEM AND LEGAL OBLIGATION

The foundation of Hart's theory of law is his account of a social rule. According to this account, 'a social rule has an "internal" aspect, in addition to [its] external aspect'. The external aspect 'consists in the regular uniform behaviour which an observer could record' (*CL*, 56). For example, an observer might record that the members of a particular group of churchgoers typically remove their hats upon entering church. The internal aspect is a 'critical reflective attitude to certain patterns of behaviour as a common standard', ie Hart's internal point of view (*CL*, 57). Thus, on Hart's account, the churchgoers described above participate in a social rule only insofar as a sufficient number of them take the attitude of the internal point of view with respect to a shared standard of behaviour that in turn leads them as a group to perform the external behaviour—in this case, removing their hats in church—that an observer might record.

Hart's signal contribution to legal philosophy is the idea that at the core of any legal system there lies a trio of social rules: the system's rules of recognition, change, and adjudication. Roughly put, a legal system's rule of recognition is a standard comprising the criteria of legal validity that specify the legally valid norms of the system; the system's rule of change is the standard that specifies how to modify the content of the system's legally valid norms; and the rule of adjudication is the standard that creates the offices (ie the courts) that are charged with applying the system's legally valid norms as the basis of their legal decisions (*CL*, 91–97).

Hart holds that there are 'two minimum conditions necessary and sufficient for the existence of a legal system' (*CL*, 116). Namely, the system's officials must take the internal point of view with respect to the rules of recognition, change and adjudication, and the relevant citizenry must generally follow the norms identified as legally valid by the system's rule of recognition (*ibid*).

Hart also supplies a theory of legal obligation. He holds that obligations in general are species of social rules. As he puts it, '[social rules] are conceived and spoken of as imposing obligations when the demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great' (*CL*, 86). In one noteworthy passage from the 1988 interview, Hart revises and clarifies this account of obligation.

> [W]hat is necessary to constitute the obligation-imposing rules is not merely that they should in fact be supported by a general demand for conformity and social pressure, but that it should generally be accepted that these are *legitimate* responses to deviations in the sense that they are permitted if not required by the system. (*RCL*, 283)

On this revised account, obligations are a form of social rule distinguished by a distinctive obligation-constituting form of the internal point of view. Whereas for a garden-variety social rule to exist, a sufficient number of the group's members must take a critical reflective attitude that comprises dispositions to criticise violations of the rule and to accept such criticisms as legitimate, for an obligatory social rule to exist, this attitude must also include dispositions to demand conformity, to apply insistent social pressure, and to accept such responses as legitimate.

In yet another noteworthy passage from the 1988 interview, Hart revises his account of legal obligation in accordance with this revised account of obligations.

> Such enacted rules imposing obligations need not be and frequently are not supported by general social pressure, but are supported by ancillary rules permitting or requiring officials to respond to deviations with demands and coercive measures to secure conformity. These responses will not be merely predictable consequences of deviations (and indeed may not always be predictable) but will be *legitimate* responses to deviations, since officials are permitted or required to make them. This reflects the internal point of view of officials accepting secondary rules of recognition as identifying the rules which the courts are to apply to cases coming before them. (*RCL*, 283)

Thus, Hart cites the ancillary coercive rules that support the norms recognised by a system's rule of recognition as evidence that legal officials accept the rule of recognition from the obligation-constituting form of the internal point of view. Thus, I gloss Hart's revised theory of legal obligations as follows. The legal obligations of any legal system are those norms recognised by a law-recognising standard that the system's officials accept from the obligation-constituting form of the internal point of view.

As is well known, Hart states in the preface to *CL* that 'Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology … ' (*CL*, vi). In the same vein, Hart states in the 1988 interview:

> The point of a theory of legal obligation (and indeed of descriptive jurisprudence in general) is to provide an illuminating form of description of a specific type of social institution which will bring out clearly certain salient features of the institutions, which given the general human condition, are of universal importance. (284)

Thus, when Hart enumerates necessary conditions of legal systems and legal obligations as described above, we should not read him as making claims about the metaphysically necessary properties of some object, but rather as providing a 'form of description'—that is, a constructed concept[6]—of social phenomena in order to illuminate their important features.

6 Cf Keith Culver and Michael Giudice, 'Complementing Comparison' (2013) 4 *Transnational Legal Theory* 700, 703.

2. CONTESTING THE CONSTRUCTED CONCEPT OF A LEGAL SYSTEM

In his contribution to *RCL*, John Gardner considers Hart's fable about the emergence of the rule of recognition. According to this fable, the rule of recognition was a technical innovation, for it specifies conclusively identifying marks of the society's binding rules and thereby remedies the defects of unclarity and uncertainty about the existence and content of such rules. Gardner notes that this fable aligns Hart with Lon Fuller's quasi-natural view, for Hart claims that at the foundation of any legal system is a rule of recognition that clarifies the relevant society's binding rules. Thus, Hart's rule of recognition necessarily satisfies at least one of Fuller's rule-of-law virtues: publicity. Hence, Hart seems committed to the natural law claim that 'necessarily, a legal system substantially lives up to the ideal of the rule of law' (*RCL*, 87).

In his contribution, Leslie Green registers a similar observation that relates to the following passage from Hart:

> We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a *natural necessity*; and some such phrase is needed to convey the status of the minimum forms of protection for persons, property, and promises which are similarly indispensable features of municipal form. (*CL*, 200)

Thus, Hart concludes that the legal content of any municipal legal system must include norms that sanction violations of the system's law as well as norms that at least to some degree protect property, persons and contracts.

Green agrees with Hart's conclusion, although he quibbles with and revises Hart's arguments for it. Green joins Gardner in the view that Hart must accept that there are necessary connections between law and morality.

> For if the minimum content is conceptually necessary, then it is simply false that, as [Hart] also asserts, 'there are no necessary or conceptual connections between the content of law and morality'. (*RCL*, 200)

Pace Gardner and Green, Hart could finesse the tension between his fable and his claims about the minimum content of law on the one hand and his claim that there is no necessary connection between law and morality on the other. I have suggested above that Hart constructs a concept of a legal system comprising two necessary and sufficient conditions. According to this concept, a social institution is a legal system so long as it meets these two conditions, and, hence, irrespective of whether any of its norms are coercive, have the effect of clarifying what the laws of the system are, or protect property, persons, and contract, and so on. Thus, Hart could coherently claim that, as a matter of conceptual necessity, a legal system need not bear any of the morally valuable features enumerated above, but so long as the human condition is as it is now, any actual legal system invariably includes these features. Or, as Hart might put it, as a matter of natural (as opposed to conceptual) necessity, any legal system invariably includes the foregoing valuable features.

Although the foregoing position is coherent, whether it is well motivated remains to be seen. As Green's and Gardner's discussions illustrate, Hart's objects of inquiry, the state-level social institutions that Hart referred to as municipal legal systems, invariably bear the morally valuable features enumerated above. The key question, then, is whether and on what basis any legal theorist might be warranted in constructing a concept of a legal system that includes among its necessary elements the two conditions that Hart enumerates, but does not include these morally valuable concomitants.

As stated in the passage cited above, Hart's guiding aim is 'to provide an illuminating form of description' of municipal legal systems. One might argue that Hart's austere concept accords with this aim, for it brings the following fact about legal systems into relief: So long as the core human capacities, vulnerabilities and psychology remain as they have been for millennia, any system that meets the two conditions specified by this concept must also bear the morally valuable features noted above. As I detail immediately below, Endicott's contribution can be read as a brief for constructing a less austere concept of a legal system.

Endicott cites Leiter for the following proposition:

> It is a mistake to assume that a distinction, to be useful for *many* purposes, has to be made in terms of *essential* properties that will demarcate *all* cases for all purposes, the way that the molecular constitution of water definitely settles the status for all clear potable liquids … For most purposes, we operate quite well with the method of paradigm cases, and analogies to those cases. (*RCL*, 32)

Endicott argues that in the final sentence of this passage, Leiter undercuts his prior claim that there are no necessary features of law. Endicott states:

> An object is an instance of the concept if it is a paradigm. And an object is an instance of the concept if analogies to paradigms justify the extension of the term to the object … And this is the point of contact between the method of analogy, and necessary truths; the analogies to paradigm chairs must justify calling an object a 'chair', or it is not a chair. (*RCL*, 33)

Thus, argues Endicott, Leiter must concede that law has necessary features, for Leiter admits (in the passage cited above) that something is law only if it bears the appropriate analogical relationship to the paradigm cases of law.

Pace Endicott's suggestion, Leiter's comments about the possibility of making (presumably) conceptual distinctions between legal and non-legal norms by way of the method of paradigms and analogies are not strictly inconsistent with his position that there are no metaphysically necessary features of law. Nonetheless, irrespective of whether he has found an inconsistency in Leiter's argument, Endicott has distilled an interesting methodological position:

Endicott states:

> Paradigms are to be identified, and analogies are to be drawn, in light of the values that are implicated in the purposes and ends of artefacts such as law or such as chairs. (*RCL*, 34)

Here, Endicott embraces the key premise in Leiter's argument that 'law' is an artefact concept, meaning it is a concept of 'something that necessarily owes its existence to human activities intended to create that artefact' (*RCL*, 31). Moreover, Endicott prescribes a desideratum for constructing such artefact concepts. Its paradigms are to be identified and its analogical extensions are to be drawn in light of the values implicated in the purposes and ends that motivate the creation of the artefact objects. Thus, Endicott urges a construction of the concept of a legal system that has a paradigm-based structure as opposed to the classical definitional structure, that is, a concept comprising a definitional list of necessary and sufficient conditions, exemplified by the concept of a legal system that Hart defends.

In defence of the paradigm-based construction of the concept of a legal system, one might argue that it illuminatingly brings to the fore the key values that inform and guide a significant number in the creation and maintenance of their society's legal system and that ideally such systems would fully realise. Accordingly, the paradigm legal system would fully realise these values, and only those legal systems that were sufficiently like the paradigm in this respect would count as instances of a legal system. So construed, the underlying argument and form of Endicott's paradigm-based methodological approach closely resembles John Finnis' natural law position that posits core and degenerate cases of law.

Particularly relevant for present purposes is a passage from Finnis' contribution to *RCL* in which he both criticises Hart and recapitulates some elements of his natural law position.

> The defects that Hart points to in his great central argument are kept clear, by him, from being described as what they primarily are: defects that create *moral* obligations for the community or its elites to *move to* truly *legal* order by instituting *both* regular legislative powers and institutions (so that people can know in advance what their community expects of them and social problems and injustices be tackled in timely and coherent ways), *and* courts that can resolve disputes about the meaning and application of legally recognizable rules in the impartial and truth-seeking way. (*RCL*, 234–5)

Thus, Finnis asserts that there are a variety of values that justify creating, maintaining and complying with the order that legal systems provide, and he suggests that appreciation of these values animates the behaviour of many whose efforts sustain such order.

More pointedly, Finnis adds:

> Such a fully and critically normative sense of 'reasons', and exploration of reasons, is the solid foundation for an adequately illuminating and explanatory account of law. (235)

To put this criticism in the terms I am using, Finnis criticises Hart for constructing a concept of a legal system that does not include servicing the moral values enumerated above as a necessary feature, for, so constructed, the concept obscures a morally important feature of Hart's object of inquiry. By contrast, so the argument might go, Finnis constructs a concept of a legal system with a core/degenerate case structure that illuminates this important feature, for it assigns core status to those

legal systems that ideally service these values while at the same time allowing that systems that perform this function to a sufficient degree (eg, presumably all extant municipal legal systems within the observational purview of legal theorists) also count as legal systems.

3. DESCRIBING THE STRUCTURE AND CONTENT OF THE WILD CONCEPT OF LEGAL VALIDITY

Green and Gardner attribute to Hart the positivistic thesis that, as Gardner puts it, there are no necessary moral tests of legal validity (*RCL*, 93–94, 206). This is meant to contrast with the thesis defended by many non-positivists (heretofore moral-test non-positivism) which holds that there are such necessary moral tests. Presumably, the modality that informs these claims is conceptual, and the concept that fixes this modality is the general concept of legal validity. So construed, an inclusivist version of the positivist thesis would hold that as a matter of conceptual possibility, a norm might be legally valid by virtue of satisfying a standard that does not include a moral test. By contrast, an exclusivist version of this positivist thesis would hold that as a matter of conceptual necessity, a norm could not be legally valid by virtue of meeting a standard of validity that includes a moral test. And, in this same vein, the non-positivist thesis described above would hold that as a matter of conceptual necessity, a norm cannot be legally valid unless it satisfies a standard of validity that includes a moral test. Thus, we might characterise inclusivism, exclusivism and moral-test non-positivism as rival constructions of a general concept of legal validity.

Construed in the way set out above, inclusivism's appeal to Hart is easy to see. Hart could have observed that in some municipal legal systems, such as the British system, officials rarely or never apply moral tests to identify the system's valid norms, while in others, such as the American system replete with a bill of rights and a Constitution, officials frequently apply such tests. Thus, the inclusivist concept of legally valid readily recognises the validity of the British and American sets of norms, whereas it would seem that exclusivism and moral-test non-positivism counterintuitively recognise the validity of either one set or the other, but not both.

A response available to both the exclusivist and the moral-test non-positivist rests on a distinction between two kinds of concepts. The first kind includes the rival general concepts of legal validity championed by inclusivists, exclusivists and non-positivists described above. The second kind comprises those, as it were, wild or non-reconstructed concepts of the legally valid norms of particular legal systems that animate and guide the law-recognising behaviour of the officials of those respective systems, such as the concept of the legally valid norms of the British, American or German legal systems. These two concepts are related. I submit that we should construe legal theorists as constructing a general concept of legal validity that purports to be descriptively faithful to the particular concepts of legal validity that animate all actual social institutions within their observational purview (eg Hart's municipal legal systems). On this reading, Hart's account of the internal aspect of the rule of recognition is his general concept of legal validity that purports

to illuminate and describe the shared features of the particular concepts of legal validity that animate municipal legal systems.

From the pages of *RCL*, I distill a number of challenges to the inclusivist's general concept of legal validity. *Pace* the inclusivist, the exclusivist argues that no institution within legal theorists' observational purview features particular concepts of validity that include moral tests, whereas the moral-test non-positivist argues that these concepts invariably include such tests.

3.1 The Wild Concept of Legal Validity as an Artefact Concept

As discussed above, Endicott develops his paradigm-based concept of a legal system in response to Leiter's observation that judges identify law by way of paradigm cases and analogical extensions. Although Endicott employs the paradigm-based model in service of jurisprudential concept construction, Leiter's original observation no less supports employing this model in service of a rival descriptive account of the, as it were, wild, non-constructed particular concepts of legal validity. According to this account, the officials of any legal system share a particular concept of legal validity in the sense that they have a shared understanding of the paradigm cases of their system's legally valid norms and a shared commitment to recognising any norm that bears the appropriate analogical relationship to such paradigms as legally valid.

As noted above, Endicott holds that '[p]aradigms are to be identified, and analogies are to be drawn, in light of the values that are implicated in the purposes and ends of' the artefact in question (*RCL*, 33–34). On this basis, one might argue that the particular concepts of legal validity are all paradigm-based, and hence, *contra* positivism, values play a key role in fixing the paradigm cases and the analogical reasoning that constitutes the law-recognising concept that guides legal officials in their practice of recognising the legal artefacts. However, it is an open question whether Hart's classical model or the paradigm-based model more faithfully reflects how such particular concepts of legal validity are structured and encoded in the minds of legal officials.[7] In this vein, note that even if we accept that the particular concepts of legal validity are artefact concepts, the question would remain whether they are paradigm-based, for not all artefact concepts are. To wit, the company IKEA sells a particular type of chair marketed as the 'Stefan' Chair.[8] The artefact concept of this type of chair is readily characterised in classical definitional terms: 'Stefan' chairs are those and only those objects that meet the necessary and sufficient conditions that IKEA specifies.

3.2 Bent Models

In his contribution to *RCL*, Nicos Stavropoulos defends moral-test non-positivism on the basis of arguments drawn from Mark Greenberg's bent model argument (*RCL*, 129). We can distinguish between a weak and a strong reading of this argument.

7 See above, n 7 for Chalmers' discussion of non-definitional structure.

8 www.ikea.com/us/en/catalog/products/00211088.

The weak reading focuses on the external aspect of Hart's rule of recognition—that is, legal officials' pattern of law-recognising group behaviour. A key premise of this argument is that any such pattern of behaviour is finite. Given this finitude, it is possible to construct without any inconsistency myriad models of the behaviour, many of which are bent. For example, according to one model, British officials recognise as law bills that win more than 50% of the votes cast by Members of Parliament, whereas according to a no less consistent model of the behaviour, British officials recognise all such bills as law, save for those that achieve precisely 53.287% of the vote, which (I hereby stipulate) no bill in the history of Britain has ever received. Although, it is obvious that the 53.287% model is bent and that an official would not conform to the system's rule of recognition by following it, the key question is why.

Stavropoulos, echoing Greenberg, supplies a moral-test non-positivist answer to this question:

> For any action and attitude or other contingency to determine any standard, something other than these factors must determine the relevance of each. In the examples of conventional obligation just discussed, moral facts fill that role, by making certain aspects of some practice relevant to what one ought to do, and therefore ground and explain the content of the obligation. (*RCL*, 129)

Here, Stavropoulos offers an account of the structure of the particular concept of validity of legal systems. He holds that moral facts make 'certain aspects' of the external practice of the rule of recognition 'relevant to what one ought to do, and therefore ground and explain the content of the obligation'. For example, it might be that the simple majority model of past practice is the correct model of the rule of recognition, for this model best accords with the moral facts relating to the value of giving each an equal say.

Note that the weak reading assumes that legal officials look to the law-recognising external behaviour of their fellows to determine the standard they should follow to accord with the practice. However, as I have sketched his view above, Hart would not accept this account of how legal officials reason about the identity of their system's legally valid norms, for he holds that the legal officials of any legal system take a certain attitude, the internal point of view, with respect to the same law-recognising standard. Thus, the weak reading provides an alternative to Hart's account of the internal aspect of legal officials' law-recognising practice, but it provides no reason to reject Hart's account in favour of this alternative.

By contrast, the strong reading of the bent model argument, if sound, would impugn the descriptive accuracy of Hart's account of the structure of legal officials' particular concepts of legal validity. Stavropoulos' discussion at times suggests this strong reading. To wit, in the passage cited above Stavropoulos holds that neither past practice nor any attitude can alone determine the content of any standard. Moreover, in his presentation of the bent model he cites Saul Kripke's interpretation of Wittgenstein's sceptical ruminations about the possibility and nature of rule-following. Kripke's Wittgenstein draws a parallel between the indeterminacy of practices of the sort featured in the weak reading of the bent model discussed above

and the indeterminacy of content-bearing mental states, ie attitudes. On this account, mental attitudes are no less finitary than practices, and hence are no more able than practices to rule out an infinite array of bent models of their content. On this strong reading of the bent model argument, Hart's account of the internal aspect of the content of a legal system's law-recognising standard is not tenable, for the shared attitude among legal officials that putatively bears this content is no less finitary than a practice, and hence it is no more able than a practice to preclude an infinite array of bent models of the standard's content.

If sound, this strong reading would undercut Hart's classical definitional account according to which the content of the standard that determines the extension of any legal system's law is the content born by an attitude shared by the system's officials. However, it is by no means certain that it supports Stavropoulos' conclusion that for any legal system, moral facts play a role in constituting the content of the standard that determines the system's legally valid norms. Rather, the non-positivist who accepts the force of the strong reading of the bent model argument bears the heavy burden of meeting Kripke's sceptical claim that no mental attitude, including the legal officials' law-recognising standard, has determinate content. More pointedly, the non-positivist bears the burden of explaining how adverting to moral facts cures the indeterminacy.

To name just one facet of this challenge, such a non-positivist must provide an account of moral facts that explains how they could be external determinants of the content of mental states, for at first blush, moral facts as described by a number of leading theories could not. For instance, the moral facts described by constructivist accounts seem incapable of playing this role, for they are constructions of yet other finitary mental attitudes that are no less vulnerable to bent model arguments. In a slightly different vein, to claim that moral facts are non-natural facts would be problematic, for the non-positivist who appeals to non-natural moral facts to head off the bent model's sceptical challenge must then explain why Hart would be precluded from appealing to non-natural facts about the content of mental states to head off this challenge in support of his account of the content of the rule of recognition.[9]

3.3 Disagreement

In his contribution, Pavlos Eleftheriadis puts his finger on yet another line of argument against Hart's account of the rule of recognition's structure.

> The rule of recognition is itself open to judicial scrutiny and elaboration—alongside the 'vast, central areas of the law' that we admittedly understand without controversy. But if the ultimate criteria of legal validity are themselves a matter for legal interpretation and deliberation, to be pursued by everyone and litigated in courts, then they cannot really be foundational in Hart's desired sense. (*RCL*, 72)

9 See eg Paul Boghossian, 'The Rule-Following Considerations' (1989) 98 *Mind* 507 for a non-naturalist answer to Kripke's challenge.

Thus, Eleftheriadis seconds Ronald Dworkin's observation that, as a matter of descriptive fact, rather than agreeing with respect to particular criteria of validity that would then, in accordance with Hart's account, determine their legal system's set of legal obligations, legal officials oftentimes disagree about these criteria.

In the 1988 interview, Hart describes and responds to a similar line of criticism from Dworkin.

> Dworkin … attributes the importance which the positivist theorist attaches to there being judicial agreement and consensus as to the criteria of valid law to a fallacious theory of meaning or 'semantic' theory. According to Dworkin's version of this theory, there must be agreement as to such criteria, for if there were not, the word 'law' would mean different things to different people, and in using the word they would always be talking past one another, not communicating about the same thing. In those circumstances there could be no intelligible argument or disagreement about what the law of a particular system is or what law in general is. (286)

As Hart rightly notes, Dworkin characterises Hart's view as a semantic theory. So characterised, Hart's view is that there must be a fulcrum of agreement among the officials of any given legal system about their system's law-recognising standard, for without it officials might use the same words, such as 'legally valid', when putatively discussing their system's laws, but they would just be using the same words to refer to different things.

Hart then goes on to reject this characterisation:

> I can only say that such a semantic theory never crossed my mind, and my doctrine of the rule of recognition does not rest on the meaning of the word 'law' or on any theory of meaning. It rests on the consideration about the need for judicial consensus as to the criteria of law, and the requirement that there should be a collective interpretation among the judiciary, which I have explained above. (286)

And in the referenced passages, Hart states:

> [S]uch consensus is of the utmost importance if incoherence in the decisions of the judiciary as a whole is to be avoided, and if the law is to be a guide to citizens which will enable them to co-ordinate their activities and their behaviour. (286)

However, this response is puzzling, for it seems to concede Dworkin's and now Eleftheriadis' main point.

In the foregoing passages, Hart accepts that if there is no judicial consensus, then there is no coherence 'in the decisions of the judiciary as whole'. More pointedly, without such consensus, the judiciary is divided into factions holding competing views of their system's criteria of legal validity, and, hence, there is no unitary body of legally valid norms defined from the internal point of view of the system's judiciary (or legal officialdom) as a whole. At most, we could say that, for any system, there are Legally Valid Norms_1 through Legally Valid Norms_N, where N is determined by the number of competing factions within the relevant system. Thus, given the fact of disagreement among legal officials about their respective

systems' criteria of legal validity, Hart's classical definitional account implies that such officials 'would always be talking past one another, not communicating about the same thing'.

The paradigm-based and judicial-scrutiny based models hold the promise of salvaging Hart's project of providing a unitary account of the legally valid norms of any legal system, for they provide an account of the fulcrum of agreement among legal officials that eludes Hart's account. On the paradigm-based model, the fulcrum of official consensus is a shared understanding of the paradigm cases of legal obligations and a shared sense that these cases are unified by the underlying point of legal officials' law-recognising practice that, in turn, provides the basis for recognising analogous norms as law. On Eleftheriadis' proposal, the fulcrum is a generally shared sense that the system's ultimate criteria of validity are those that best withstand 'judicial scrutiny and elaboration'.

4. DEBATING THE AUTHORITY OF LAW

As noted above, Endicott asserts that moral values establish the paradigms that populate paradigm-based concepts, and Eleftheriadis holds that the merit of putative criteria of validity, meaning among other things their moral merit, is a basis for scrutinising and for accepting or rejecting such criteria as the relevant legal system's criteria. Thus, both the paradigm-based and judicial-scrutiny alternatives to Hart's account of the particular concepts of legal validity seem to support the moral-test non-positivist thesis that moral considerations play a key role in determining the norms that count as law in any legal system. In his preface to *CL*, Leslie Green draws attention to an alternative non-moral consideration that might play this role while at the same time precluding moral considerations from playing it. Namely, Green notes that Hart overlooked potential implications of the conceptual connection between legal validity and authority (*CL*, xliii–iv). As Green also notes, Joseph Raz has offered a sophisticated and cogent account of these implications.

As Raz puts it, 'the law claims authority' and, as such, as a matter of conceptual necessity, legal norms must be capable of being authoritative.[10] To put this thought in terms of the paradigm-based model of the rule of recognition, the capacity to be authoritative is a key element of the point that establishes the paradigm cases of legal obligation and their analogical extensions. And, to put this thought in terms of the judicial scrutiny model, to survive judicial scrutiny a putative criterion of validity must pick out norms that are capable of being authoritative.

On Raz's account, A has authority over B only insofar as the fact that A directs B to phi is itself a reason to phi and B has conclusive reason to exclude and replace at least some of her reasons for not phi-ing with the directive. As Raz sometimes characterises this same idea, authorities distinctively play a mediating role between their subjects and their reasons. Raz asserts that the law's claim to authority

10 See eg Joseph Raz, 'Authority, Law and Morality' (1985), republished in *Ethics and the Public Domain* (Oxford University Press, 1994).

is distinctively expansive, for on his account the law claims that its directives settle the relevant issue at hand, meaning that they exclude and replace all reasons for not acting as the law directs.

The key thrust, then, of Raz's argument in support of exclusive legal positivism is that a norm could not perform the defining function of legal norms—that is, mediating between the authority's subject and all of her reasons for not acting in accordance with the norm—if those subject to it could only determine its authoritative status by considering whether some of the reasons against complying with the norm required not complying with it. Thus, Raz's argument suggests how considerations relating to authority might play a law-determining role within the paradigm and judicial-scrutiny models of the particular concepts of legal validity, and, in so doing, they would preclude moral reasons (along with any other reasons that the law purports to mediate) from playing that role.

In the final part of his contribution, Stavropoulos describes and criticises the following view:

> On this view, laws are directives (orders, instructions) which convey an intention that subjects be placed, by that very act, under an obligation to take some action. What the institution says constitutes a norm that is thereby added to the law, and subjects are meant to comply, that is, conform for the reason that the institution said so. (142)

As I read it, the view described here holds that only those directives that express some institution's (eg some court's or legislature's) intention that its subjects act as directed can be law. Thus, Stavropoulos set his sights on a view that is at least highly similar to the thesis Raz advances in support of exclusive legal positivism:

> To play this role the law must be, or at least be presented as being, an expression of the judgment of some people or of some institutions on the merits of the actions it requires.[11]

Stavropoulos' main criticism of this view is that legal officials specifying the content of their system's legal obligations oftentimes do not reason as though they are trying to identify the content of any particular pre-existing intention. As he puts it:

> [A]lthough judges spend much time arguing about what expressions and sentences of statutory and other texts mean, in the course of working that out they often appeal to considerations that are not obviously or even plausibly constitutive of the linguistic content conveyed by the production of the texts. (*RCL*, 147)

In support of this point, Stavropoulos observes that judicial opinions oftentimes lack any explicit statement of the opinion's *ratio*, and hence, later courts seeking to identify the binding holding of the past court are forced to extract and formulate the *ratio* for themselves. However, in such cases, later courts do not reason as though they are trying to ascertain the *ratio* that the judges who authored the

11 *Ibid*, 231.

precedent had in mind. Thus, Stavropoulos raises doubts about the empirical plausibility of the idea that legally valid norms can only be those norms that are some pre-existing intention or judgement regarding how those subject to the norm ought to behave, for legal officials as a matter of practice recognise as legally valid norms (eg *ratios* of precedent cases) that are manifestly no-one-in-particular's view of how those subject to the norm ought to behave.

I should point out that notably absent from Stavropoulos' discussion is Raz's thought that to be capable of being authoritative, a norm need not be someone's view of the merits of the norm-subject's action; rather, it must either be someone's view or *be presented as such*. The key idea behind this qualification is that a norm can be presented as someone's view so long as it can be pieced together on the basis of the relevant sources and those conventions for interpreting those sources that do not involve bringing considerations about the merits of the action in order to specify the norm's content.

The foregoing key idea comes into close contact with a noteworthy point that Green makes in *RCL* (202)—namely, not all laws are intentionally created. As we have seen, although a judicial opinion is intentionally created, its *ratio* need not be. Similarly, as Stavropoulos cogently argues, although legislators in some sense intentionally enact a statute, the content of their individual intentions might diverge from the ensuing content of the legally valid norm that their actions have created. *A fortiori*, a custom might be law even if the participants in the custom did not intend to create any law. Note too that the foregoing observation leads Green to conclude that Endicott's and Leiter's characterisation of law as an artefact concept is not quite right, for not all laws owe their existence to human activities intended to create that artefact (*ibid*).

CONCLUSION

Here, I have focused on the contributions to *RCL* that address Hart's modal claims about legal systems. One of the main aims of this review has been to argue that these and similar modal claims made by other legal theorists should be construed in terms of conceptual necessity, where there are two concepts at issue: the constructed concept of a legal system and the wild particular concepts that animate the law-recognising behaviour of officials. The key thought is that, construed in this way, these claims and their supporting arguments are about issues of great philosophical importance—namely the content and structure of the concepts that animate judicial law-recognising behaviour and the form of description—that is, the constructed concept—that best illuminates the social institutions that we pretheoretically refer to as law.

Due to limited space, I have only discussed material from *CL* and *RCL* directly relevant to the agenda of this review. While I hope that the quality and import of this material is now evident, I can only baldly state that there is much in *CL* and *RCL* outside the compass of this agenda that any student of moral, political or legal philosophy should read.