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## H.L.A. HART By Neil MacCormick

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# BOOK REVIEW

H.L.A. HART. By Neil MacCormick. Stanford, California: Stanford University Press, 1981. Pp. viii, 184. \$18.50.

*Reviewed by Kenneth Henley\**

English legal positivism began with the clarity of Jeremy Bentham and John Austin, but their clarity sometimes was achieved by sacrificing conceptual subtlety. In 1961 H.L.A. Hart published *The Concept of Law*<sup>1</sup> and renewed the positivist tradition with a subtlety that did not sacrifice clarity. It is appropriate, therefore, that Neil MacCormick's study of Hart should begin the monograph series *Jurists: Profiles in Legal Theory*.<sup>2</sup>

The conceptual separation between law and morals serves as the primary tenet of legal positivism. Although "positive morality" (the moral beliefs prevalent in a particular society) influences the development of law, the law—once formed—exists as a distinct social fact. The English founders of positivism were utilitarians and thus committed to reforming both positive law and positive morality in light of the principle of utility. But the question of what the law *should* be, even within the framework of a critical morality like utilitarianism, must be distinguished from the question of what the law *is*. Thus, law conceptually is distinct both from the positive morality out of which law grows and from the reflective, critical morality that partly determines one's reasoned evaluation of law. Hart never departs from this crucial positivist view that a legal system constitutes a complex social fact that is distinct from the positive morality of the society and from an ideal of law informed by critical moral thought.

For legal positivists, then, legal validity results from some factual social relationship. John Austin equated legal validity with the social fact of general commands, issued by a sovereign and backed

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1. H.L.A. HART, *THE CONCEPT OF LAW* (1961).
2. N. MACCORMICK, *H.L.A. HART* (1981).

with sanctions.<sup>3</sup> Austin defined a sovereign as a person or persons whom others habitually obey, but who do not habitually obey anyone else.<sup>4</sup> A legal obligation is simply an individual's forced reaction to the sovereign's coercion. It is at this point that Hart breaks with his predecessors and develops a new subtlety in treating law as a social fact.

Hart rejects Austin's imperative theory of law.<sup>5</sup> The notion of habitual obedience under the threat of sanctions will not suffice as the key to jurisprudence. Rather than a habit of obedience, jurisprudence must attend to the social fact that people follow certain rules which generally are accepted as common standards for conduct. A legal system elicits desired behavior through two kinds of rules: primary rules, which impose duties; and secondary rules, which confer both public powers, such as adjudication and law-making, and private powers, such as will making and marriage. The key to jurisprudence emerges from the combination of primary and secondary rules. In a modern state, subjective acceptance of the rules need not exist except among public officials, though acceptance normally will be broader for those primary rules of which laymen are likely to know, for example, prohibitions against murder and theft.

MacCormick's study suggests that Hart's method is correct and that it can, when pressed more thoroughly, resolve certain difficulties and inadequacies in Hart's own account of law. An adequate theoretical method must distinguish between a mere general pattern of behavior, which can be described adequately from an "external point of view," and actions that express the actor's acceptance of a particular rule as a common standard. Austin's imperative theory of law worked only within the external point of view, and so failed to capture the "internal aspect" of legal rules. In an effort to capture Hart's emphasis upon this internal aspect of rules, MacCormick insists on labelling Hart's method "hermeneutic."<sup>6</sup> Using this unhelpful word, MacCormick strives to clarify the internal viewpoint, a task he claims is necessary because Hart himself fails to do so. Despite this attempt, Hart's original discussion on the internal aspect of rules and the internal viewpoint<sup>7</sup> are

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3. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 9-16 (2d ed. London 1861) (1st ed. London 1832).

4. *Id.* at 193-96.

5. H.L.A. HART, *supra* note 1, at 49-60.

6. N. MACCORMICK, *supra* note 2, at 29.

7. H.L.A. HART, *supra* note 1, at 55-60.

much clearer than MacCormick's attempt to clarify them. Hart clearly suggests that the theorist describes the internal point of view, but does not acquire it; it is the officials of the legal system who actually take the internal point of view. MacCormick spends some time discovering this, labels the theoretical viewpoint the "non-extreme external point of view,"<sup>8</sup> and then writes, "[T]o avoid the awkwardness of continuing to talk of a 'non-extreme external point of view', I shall henceforward dub that position the 'hermeneutic point of view', and foist this upon Hart in the hope of making clearer an essential but not fully elucidated fulcrum of his theory and methodology."<sup>9</sup> A theorist's description of the internal aspect of rules is not so mysterious as this passage indicates, however, and Hart's method of analyzing law hardly needs such fancy footwork to distinguish it from a judge's method of following legal rules.

Within the general theme of Hart as hermeneutic jurist, MacCormick discusses Hart's analytic jurisprudence and Hart's contributions to debates concerning the reformation of law in accordance with liberal social-democratic principles, but this second side of Hart receives much less attention than the first. MacCormick devotes only about four pages to Hart's debate with Barbara Wooton<sup>10</sup> over *mens rea* as an element in the definition of crimes and the relationship of punishment to responsibility. Similarly, only a few pages deal with the important debate between Hart and Patrick Devlin<sup>11</sup> over the legislation of morality (spurred by the Wolfenden Committee's recommendation<sup>12</sup> to decriminalize private homosexual acts between consenting adults). These oversights give an unfortunate imbalance to the book, for these more practical views are well reasoned and are of great interest to a wider audience than that likely to examine Hart's analytical jurisprudence.

Nevertheless, MacCormick does provide a thorough account of Hart's analytical jurisprudence, stopping at crucial points to offer both sympathetic criticisms and ways that Hart's analytic method might overcome those criticisms. MacCormick's criticisms gener-

8. *Id.* at 37-38.

9. *Id.* at 38.

10. H.L.A. HART, *Changing Conceptions of Responsibility*, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 186-209 (1968).

11. H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

12. REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, CMD. 247 (1957) (The Wolfenden Report).

ally follow the path already charted by Ronald Dworkin, Hart's successor to the Chair of Jurisprudence at Oxford. Dworkin has argued<sup>13</sup> that law cannot be viewed as a system of rules and that law and general principles of morality interrelate to a greater extent than Hart allows. MacCormick follows Dworkin in both these criticisms,<sup>14</sup> although he does not, like Dworkin, reject Hart's view that judges inevitably exercise discretion in applying the law to hard cases.<sup>15</sup> Neither does MacCormick follow Dworkin's rejection of Hart's notion of a "rule of recognition" that determines the legal validity of all other rules.<sup>16</sup> In agreeing with Hart on these points MacCormick expresses a puzzling combination of views, for once one rejects Hart's model of rules, one also must abandon the attempt to replace the Austinian sovereign with a master rule of recognition. As Dworkin argues, this result amounts to an abandonment of the core positivist tenet that law can be identified through some empirical "pedigree."<sup>17</sup>

What do MacCormick and Dworkin contend is wrong with Hart's view that a legal system is a union of primary rules imposing duties and secondary rules conferring public and private powers? MacCormick argues that rules are relatively precise and, in a sense, arbitrary.<sup>18</sup> Thus, MacCormick claims, both positive morality and positive law are complex sets of standards, only some of which are rules in this strict sense. Dworkin argues that rules apply in a yes-or-no fashion—a rule either has or has not been followed. Principles and policies, on the other hand, contain an extra dimension of *weight*: a principle can be relevant to a case and yet not determine the outcome, for some other more weighty principle may also be relevant.<sup>19</sup>

These criticisms of Hart's model of rules take insufficient account of Hart's view that any rule necessarily includes "a fringe of vagueness" or "open texture."<sup>20</sup> Where Dworkin and MacCormick see two distinct categories (rules on one hand and principles or values on the other), Hart sees a continuum. Hart calls everything in this continuum a rule—a characterization not without precedent in

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13. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

14. N. MACCORMICK, *supra* note 2, at 67-68, 160-62.

15. *Id.* at 126-30.

16. *Id.* at 119-20.

17. *See* Dworkin, *supra* note 13, at 44.

18. N. MACCORMICK, *supra* note 2, at 41-42.

19. Dworkin, *supra* note 13, at 25-29.

20. H.L.A. HART, *supra* note 1, at 119-20.

legal terminology, since even very general equitable principles often are called "rules of equity" by courts. Thus, both critics fail to see that Hart's positivism includes not only a doctrine of judicial discretion in the practical application of particular legal rules, but also the equivalent of discretion in the manner in which the master rule of recognition is applied to hard cases. Hart writes,

[N]othing can eliminate this duality of a core of certainty and penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or "open texture", and this may affect the rule of recognition specifying the ultimate criteria used in the identification of the law as much as a particular statute.<sup>21</sup>

Hart gives a clear account of this open texture in the case of fundamental constitutional rules and concludes that "[h]ere all that succeeds is success."<sup>22</sup> In this positivistic sentence Hart encapsulates his view that fundamental rules for identifying law cannot be judged valid or invalid, only accepted or not accepted. Therefore, since all rules have some openness of texture, the decision in a hard case to interpret a fundamental rule a particular way will be doubly a matter of success in getting the decision accepted. First, the rule itself depends totally upon acceptance—since it serves as part of the criteria of validity for all law, it cannot be valid or invalid. Also, the extension of the rule to a new and difficult application will be underdetermined in the same way that extensions of ordinary law can be. Hart's notion of a rule of recognition thus is not subject to criticism based upon an interpretation of his jurisprudence that would require it to produce a definite, clearly defined rule-in-the-strict-sense for identifying valid law within a legal system.

MacCormick's principal criticisms of Hart's rule of recognition come from another perspective. Unlike Dworkin, MacCormick sees some value to the rule of recognition idea, although he contends that it requires important modifications. MacCormick seems to think that Hart sees a rule of recognition as a power-conferring rule in the same sense as are rules of adjudication. MacCormick suggests rather that the rule of recognition is a special kind of duty-imposing rule usually addressed to judges and other officials; the rule of recognition requires that these officials recognize and enforce only those legal standards specified by its criteria. Under this theory the rule of recognition still is a secondary rule, for it is

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21. *Id.*

22. *Id.* at 149.

about those primary rules that impose duties and obligations on citizens.<sup>23</sup>

Although MacCormick's discussion of secondary rules is more precise than Hart's, Hart provides MacCormick's core idea in noting that the only characteristic all secondary rules share is that they are *about* primary rules.<sup>24</sup> True, Hart also refers to secondary rules as power conferring, but this reference is defensible (even if it is not the only defensible view). In MacCormick's account, the rule of recognition imposes duties on those in a judicial role.<sup>25</sup> Could not the rule of recognition thus be seen as power conferring in the sense that it partly defines the scope of the judicial role? The judiciary exercises the authority to declare the law authoritatively within the constraint of the rule of recognition. Indeed, conceiving of the rule of recognition as power conferring makes even more sense given the open texture of all rules on Hart's theory, for those in a judicial role will be limited by the accepted rule of recognition in clear cases, and will inevitably initiate extensions of the rule in hard cases—if their extensions are accepted within the society.

An example of this interpretation using secondary rules conferring *private* powers might clarify the issue. Do the requirements for a valid transfer of real property impose duties on those exercising that power, or are they better conceived as a definitional element of the legal power to bring about this transfer? The second alternative seems more helpful as a description of the legal concepts involved in such a transaction. Likewise, the requirement that a judge recognize as law only what the rule of recognition picks out is closer to a definition of the judge's power than to the imposition of a strict duty in the usual sense. Perhaps MacCormick sees these problems more clearly than Hart, but the necessity of his solution appears questionable at best.

MacCormick offers as an analytical model a simple society in which an elementary rule of recognition exists, but not a power-conferring rule that establishes adjudicatory powers.<sup>26</sup> This model is intended both to show that a rule of recognition need not be associated with rules of adjudication and to vindicate MacCormick's view that the validity of laws does not logically depend on the rule of recognition.<sup>27</sup> For MacCormick, a rule of recognition

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23. N. MACCORMICK, *supra* note 2, at 120.

24. H.L.A. HART, *supra* note 1, at 92.

25. N. MACCORMICK, *supra* note 2, at 112-15.

26. *Id.* at 111-15.

27. *Id.* at 115.

applies quite distinctly to the duties of those in a judicial role, and so it cannot be the basic source of legal validity.<sup>28</sup>

The analytical model used by MacCormick<sup>29</sup> to support his version of the rule of recognition differs significantly from Hart's own example of the most elementary rule of recognition.<sup>30</sup> MacCormick pictures a society of customary rules, including a crucial rule against violence (except in cases involving self-defense or retaliation). He then imagines that the elders of the society assume a judicial role, with the duty to base their judgments on established custom. He claims that the judicial role contains no normative power in this type of society.

No more does that [case] involve an exercise of normative power than does this case: boys playing football in a park have a dispute whether something one of them did was a foul, so they ask a spectator to give his opinion, and he gives it and they accept it.<sup>31</sup>

MacCormick overlooks an all-important difference between the boys playing football and his imaginary society. The elders eventually come to have a customary status as judges of customary standards, but the spectator whose word the boys accept has no such status. No reason exists not to describe the elders as exercising customary normative powers; that these powers are unstated is irrelevant, and, furthermore, they are not likely to remain unstated for long. Hart offers a much more helpful account of this kind of case, assuming that the elders function under customary rules of adjudication, however simple and unstated.

Indeed, a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition. . . .<sup>32</sup>

The rulings of the elders inevitably will be taken as conclusive of the existence of custom (as long as these rulings meet with sufficient social acceptance), and eventually penumbral applications will be handled through the rulings, for example, what constitutes self-defense in a difficult case. Hart emphasizes the interrelatedness of rules of adjudication and the rule of recognition, and elsewhere he insists that rules for changing law interrelate with the

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28. *Id.*

29. *Id.* at 112-14.

30. H.L.A. HART, *supra* note 1, at 92; *see infra* notes 34-36 and accompanying text.

31. N. MACCORMICK, *supra* note 2, at 112.

32. H.L.A. HART, *supra* note 1, at 94-95.



rule of recognition.<sup>33</sup>

Hart's example of the simplest clear case of a rule of recognition, however, involves not the customary adjudication of customary law as does MacCormick's analytical model, but rather "the mere reduction to writing of hitherto unwritten rules," followed by the crucial step of "acknowledgement of reference to the writing or inscription as *authoritative*."<sup>34</sup> MacCormick frequently criticizes Hart for paying too little attention to the history of law,<sup>35</sup> but given the point of Hart's notion of a rule of recognition, and his whole theory, Hart here rests on solid historical footing. Through his theory of law Hart attempts to illuminate the theoretical foundation of central cases arising out of fully developed legal systems. Although there is room for a backdoor introduction of a rule of recognition through customary adjudication, the central case is in fact precisely the production of an authoritative written code for an already complex society.<sup>36</sup>

On the whole MacCormick does not improve Hart's account of the rule of recognition. But he does clarify the alternative conceptual frameworks that are possible within a theory that characterizes law as a union of primary and secondary rules. Hart consistently emphasizes the connections among the various secondary rules governing public powers of both adjudication and legislation.<sup>37</sup> He sees the rule of recognition as inextricably bound up with these other secondary rules. MacCormick's critical study attempts to extricate the rule of recognition and thus to bring more precision to this fundamental notion. Nevertheless, Hart's treatment may better capture the natural phenomena present in legal systems; perhaps public powers of adjudication and legislation simply *are* inextricably connected with the rule of recognition. Even in Hart's own example of a simple, authoritative written code, a need for interpreters of the code will still exist. Thus, customary rules of adjudication also will be necessary.

MacCormick also offers sympathetic criticism of Hart's insistence on the conceptual separation of law and morality.<sup>38</sup> MacCormick's comments are helpful here, for his suggested modification is indeed within the spirit of Hart's "hermeneutic" method

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33. *Id.* at 93.

34. *Id.* at 92 (emphasis in original).

35. N. MACCORMICK, *supra* note 2, at 108.

36. H.L.A. HART, *supra* note 1, at 92-93.

37. *Id.* at 92-95.

38. N. MACCORMICK, *supra* note 2, at 159-62.

and builds upon Hart's recognition that some minimum content of natural law must be incorporated in both positive moralities and in legal systems. MacCormick emphasizes that the practice of punishment in a legal system always expresses moral condemnation.<sup>39</sup> Thus, an important evil of morally unjust law is that it brands as immoral those who do not deserve the mark, and, conversely, it endorses as just those actions that morally call for social condemnation through the formal voice of the legal system. MacCormick argues that, "[w]hen we reexamine . . . the whole theory of and about law which Hart has presented to the world, we cannot, I think, agree that law as he analyses it stands in a merely contingent relationship with morality."<sup>40</sup> The strength of MacCormick's book is in its treatment of the subtle conceptual connection between law and morality.

MacCormick emphasizes that Hart presents a *moral* argument for keeping law and morals conceptually distinct.<sup>41</sup> Hart fears that a natural law theory will lead to an identification of the legally required and the morally obligatory, a union that leaves no room for citizens to disobey the law based on principles of critical morality. Hart, MacCormick says, "is a positivist because he is a critical moralist. His aim is not to issue a warrant for obedience to the masters of the state."<sup>42</sup> MacCormick thinks this moral aim has driven Hart to portray law and morality as conceptually more distinct than they are.<sup>43</sup> He, however, fails to point out that although natural law theorists from Aquinas to Lon Fuller have had the same moral motivation as Hart, they thought emphasizing the connection between law and morality would accomplish this aim.<sup>44</sup>

MacCormick's study is useful for those already well acquainted with Hart's work; it raises issues and suggests solutions within the general framework of Hart's theory of law. This study does not provide, however, a useful introduction to Hart's analytical jurisprudence. It often is more difficult to follow than *The Concept of Law*, and MacCormick's exposition of Hart's work tends to be a perfunctory preliminary to his own criticisms and modifica-

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39. *Id.* at 160.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 160-61.

44. See, e.g., T. AQUINAS, *Of the Power of Human Law (Question 96, Article 4)*, in *TREATISE ON LAW* 95-98 (1969); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958).

tions. According to William Twining's general preface, the series *Jurists: Profiles in Legal Theory* aims to provide "short, authoritative, reflective introductions" meant to be "sympathetically critical."<sup>45</sup> This first volume satisfies the second half of this description better than the first.

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45. N. MACCORMICK, *supra* note 1, at i.