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Citation for published version:

Duarte D'Almeida, L 2016, The grounds of Law. in W Waluchow & S Sciaraffa (eds), *The Legacy of Ronald Dworkin*. Oxford University Press, pp. 165-202.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

The Legacy of Ronald Dworkin

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The Grounds of Law

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[Final version published in Wil Waluchow and Stefan Sciaraffa (eds), *The Legacy of Ronald Dworkin* (Oxford University Press 2016) 165-202.]

In this chapter, I discuss two versions of Ronald Dworkin's objection from theoretical disagreement. I start with Dworkin's argument, in *Law's Empire*, against what he calls "the 'plain fact' view of the grounds of law." Dworkin's argument is sound; but the plain-fact view, which he misattributes to H. L. A. Hart, is a straw man. Indeed, Dworkin's argument relies on a distinction that Hart pioneered and the plain-fact view denies: the distinction between "internal," normative statements of law, and "external," factual statements about law. That is my claim in Section 1. In Sections 2 and 3, I turn to a more familiar version of Dworkin's objection—a version that has been revived in recent literature—and to some attempts to answer it. I argue that this version, too, derives its strength from charging legal positivists with the failure to distinguish between external and internal statements. Unfortunately, many theorists are guilty as charged.

1. The "plain-fact" straw man

1.1. DWORKIN ON THE "PLAIN-FACT" VIEW

In Chapter One of *Law's Empire*, at the beginning of his discussion of "disagreement about law," Ronald Dworkin introduces a distinction between "propositions of law" and "propositions [that] furnish ... the 'grounds' of law."¹ Propositions of law are "the various statements and claims people make about what the law allows or prohibits or entitles them to have;" here is one of Dworkin's examples:

* For helpful comments and discussion, I am grateful to Barbara Baum Levenbook, Cláudio Michelin, David Plunkett, Euan MacDonald, Fábio Shecaira, James Edwards, Katharina Stevens, Kevin Toh, Martin Kelly, Neil Walker, Pedro Múrias, Stefan Sciaraffa, Thomas Adams, and audiences in Edinburgh, Lisbon, Porto Alegre, and Burlington, Ontario.

¹ Dworkin (1986: 4).

(P1) [According to law,] no one may drive over 55 miles an hour in California.

Dworkin says that “lawyers and judges and ordinary people generally assume that some propositions of law, at least, can be true or false,” or at any rate “sound” or “unsound.”² This certainly rings true of a proposition like (P1). We assume not only that such propositions can be assessed as true or false—as correctly or incorrectly stating what the law is—but also that if a question arises about the truth or correctness of a proposition like (P1), there will be ways of putting our doubts to rest. If we need to be sure, we may consult a lawyer. Is it really the case, we ask, that no one may drive over 55 miles an hour in California? We would be surprised if she were to answer “I have *no* idea—and there is just no way of finding out.” But suppose she replies instead that yes, it is true that the speed limit is 55 miles an hour. “Look,” she says, “here it is, in the official statute book: a provision precisely to that effect.” That would not strike us as an odd answer. Here the proposition that

(P2) The official California statute book contains a provision to the effect that no one may drive over 55 miles an hour

is being put forth as a proposition that, in Dworkin’s terminology, provides the “grounds” of (P1):

Everyone thinks that propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic. These more familiar propositions furnish what I shall call the “grounds” of law. The proposition that no one may drive over 55 miles an hour in California is true, most people think, because a majority of that state’s legislators said “aye” or raised their hands when a text to that effect lay on their desks. It could not be true if nothing of that sort had ever happened.³

The notion of the “grounds” of law is therefore a relational notion. For any particular proposition of law *P*, the grounds of *P* will be given by whatever proposition or group of propositions “make [that] particular proposition of law [*P*] true” or correct.

Familiar as this picture may look, this “grounding” relation that supposedly obtains between (P2) and (P1) raises several questions. In what sense, exactly, does the truth of (P1)

² Dworkin (1986: 4, 417).

³ Dworkin (1986: 4).

depend on—is “parasitic” on—the truth of (P2)? Does (P2) by itself *make* (P1) true? It certainly does not entail it on its own. Or is Dworkin’s just a poorly chosen example?

Dworkin points out that there are two importantly different ways in which people may disagree about the truth-value of a proposition like (P1). One possibility is that they agree that the following conditional is true, but disagree that its antecedent is satisfied:⁴

(P3) If the official California statute book contains a provision to the effect that no one may drive over 55 miles an hour, then [according to law] no one may drive over 55 miles an hour in California.

In other words, people may agree that (P2) would, if true, make (P1) true—they may agree that (P2) would, if true, give us the grounds of (P1)—but disagree about whether (P1) itself is true, because they disagree about whether (P2) is true. Another possibility is that they agree that (P2) is true, but disagree about whether (P3) is true. In that case, they disagree that (P2), though true, gives us the grounds of (P1).

Dworkin refers to disagreements of the first kind as “empirical,” and to disagreements of the second kind as “theoretical.”⁵ These labels actually obscure his main thesis regarding the grounds of law. Dworkin wants to argue against what he calls “the ‘plain fact’ view of the grounds of law.”⁶ This is the view that, for any true proposition of law, its grounds will consist only of facts of the *sort* indicated in (P2): facts concerning “past institutional decisions,”⁷ such as facts about “what statute books and past judicial decisions have to say.”⁸ According to the plain-fact view, as Dworkin states it,

[T]he law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past. If somebody of that sort has decided that workmen can recover compensation for injuries by fellow workmen, then that is the law. If it has decided the other way, then that is the law. So questions of law can always be answered by looking in the books where the record of institutional

⁴ Dworkin (1986: 4-5).

⁵ Dworkin (1986: 5).

⁶ Dworkin (1986: 7).

⁷ Dworkin (1986: 9).

⁸ Dworkin (1986: 5).

decisions are kept ... [According to the plain-fact view] [e]very question about what the law is ... has a flat historical answer.⁹

Yet if Dworkin is right that the plain-fact view is false, it follows that the grounds of any given proposition of law will not (or not necessarily) be exhausted by such “plain facts.” That means that disagreements about whether the grounds of law are satisfied in any particular case are not necessarily empirical. This is one reason Dworkin’s labels are misleading.

Another reason is that it is also far from clear that disagreements about the truth-value of propositions like (P2) are exclusively empirical disagreements, to be settled “in the empirical way.”¹⁰ We can plausibly say that whether some document we refer to as “the official California statute book” contains a provision reading “No one may drive over 55 miles an hour” is an empirical matter (in the same sense in which it is an empirical matter whether Law’s Empire contains a sentence reading “empirical disagreement about law is hardly mysterious”). Yet the truth of (P2) does not turn solely on the fact that some book we call “the official California statute book” contains such a provision. It turns also on the fact that the book containing that provision actually is the official California statute book, rather than some other book lacking such force. (P2) is true only if the statute book it refers to is the valid statute book in California; but to say that some statute book is valid is not—not clearly, at least—to make an empirical statement.

Here is a different way of making the same point. Consider, for example, (P4) and how it relates to (P2):

(P4) The California State Legislature voted, and the governor signed, a provision to the effect that no one may drive over 55 miles an hour.

(P2) The official California statute book contains a provision to the effect that no one may drive over 55 miles an hour.

The facts reported in (P4) are the sort of facts Dworkin calls empirical; they are Dworkinian “plain facts.” Does (P2) follow from (P4) alone? It seems that the answer is “No.” In order to get from (P4) to (P2) it must also be true that the California State Legislature is legally

⁹ Dworkin (1986: 7, 9).

¹⁰ Dworkin (1986: 5).

empowered to legislate on the matter, and the governor legally empowered to sign the voted provision into law. It must be true, that is, that if the California State Legislature votes a provision to the effect that no one may drive over 55 miles an hour (and if the relevant procedures are complied with), and the governor signs it, then that text will become part of the official statute book. So to get from (P4) to (P2) we need something like

(P5) The California State Legislature is legally empowered to pass legislation imposing driving speed limits.

But (P5) is not a Dworkinian empirical proposition. Rather, (P5) is itself a proposition of law—and Dworkin does not think that propositions of law are empirical. So he cannot really maintain that disagreement about whether (P2) is true is necessarily empirical. The truth of (P2) depends in part on the truth of some further, higher-order proposition(s) of law (such as those concerning the law-making powers of the relevant bodies, or the procedures on which the validity of legislative enactments depends); two people who agree that (P4) is true may still disagree over (P2) if they disagree that (P5) really is true.

It is therefore misleading for Dworkin to present his two kinds of disagreements the way he does. For any proposition of law *P*, as he suggests, we can ask both (a) “What are the grounds of *P*?” and (b) “Are the grounds of *P* satisfied?” But he is wrong to imply that disagreements about question (b) must be empirical disagreements—disagreements about “plain facts”—“to be settled in the empirical way.”

In fact, Dworkin seems to equivocate over the meaning of the expression “plain fact.” Sometimes he speaks as if the notion of a plain fact is a function of the kind of disagreement two people have when they have different views on whether a given fact obtains: if disagreement over whether a given fact *f* is the case is empirical disagreement, *f* is a plain fact. This is one use of “plain fact.” But he also says that facts about “what legal institutions, like legislatures and city councils and courts, have decided in the past”—facts about “past institutional decisions”¹¹—are plain facts. This is a different use of “plain fact”: we have just seen that disagreements over whether facts like these are the case are not—at least not obviously—empirical.

The view Dworkin means to attack is concerned with “plain facts” in this second sense. Dworkin denies that it is only by reference to past institutional decisions that questions of law

¹¹ Dworkin (1986: 7).

can be truthfully answered. What the law is on any given matter is not, he says, merely a question of what “the statute books and past judicial decisions have to say.”¹² He thinks judicial practice supports this thesis. For judges can and very often do disagree about *what the law is* even when they agree about what the applicable statutes have to “say” on the matter. For example, judges may disagree over how an applicable statutory provision should be interpreted or construed even when the case falls unequivocally under the letter of the provision.¹³ The plain-fact view of the grounds of law cannot explain this phenomenon. It has “no good answer to the question how theoretical disagreement is possible.”¹⁴ It fails to account for judicial practice. Therefore, argues Dworkin, the plain-fact view cannot be right.

1.2. SO WHAT?

Dworkin says that many legal philosophers disagree with him on this. Most legal philosophers, he says, endorse the plain-fact view of the grounds of law; they think that “questions of law can always be answered by looking in the books where the records of institutional decisions are kept.”¹⁵ But one does not need to be acquainted with the literature to be suspicious of this attribution. Indeed, the plain-fact view seems so obviously false that it would be surprising if many philosophers had adopted it.

Dworkin himself offers an analogy—with poetry—that suggests that the plain-fact view cannot be right:

Consider the difference between a poem conceived as a series of words that can be spoken or written and a poem conceived as the expression of a particular metaphysical theory or point of view. Literary critics all agree about what the poem “Sailing to Byzantium” is in the first sense. They agree it is the series of words designated as that poem by W. B. Yeats. But they nevertheless disagree about what the poem really says or means. They disagree about how to construe the “real” poem, the poem in the second sense, from the text, the poem in the first sense.

In much the same way, judges before whom a statute is laid need to construct the “real” statute—a statement of what difference the statute makes to the legal rights of various people—from the text in the statute book. Just as literary critics need a working theory, or at least a style of interpretation, in order to

¹² Dworkin (1986: 6).

¹³ Dworkin (1986: 15-20).

¹⁴ Dworkin (1986: 11).

¹⁵ Dworkin (1986: 6-7).

construct the poem behind the text, so judges need something like a theory of legislation to do this for statutes.¹⁶

We can develop Dworkin's analogy. Suppose that I, a literary critic, put forth the following claim:

(Y) "Sailing to Byzantium" is really a lament about growing old and the proximity of death.

I put forth (Y) as the correct interpretation of Yeats's poem. Suppose you disagree. But I am prepared to defend (Y), with claims or arguments of different sorts. Those are the claims I would give as "grounds" of (Y): propositions which, if true or correct, make (Y) true or correct. Now suppose some philosopher of literary criticism claims that the grounds of (Y) can only include propositions describing plain, historical facts, such as facts, say, about Yeats's age or his actual intentions when he wrote the poem, or his own statements about what he took his poem to mean. Call this the "plain-fact view" of the grounds of propositions like (Y).

Could this view be right? It seems not. It seems, in fact, that the opposite view must be true: among the grounds of (Y), there must be at least one proposition which is not a description of any plain fact. That is because (Y) itself is not a proposition of plain fact. (Y) is a proposition about what the poem "Sailing to Byzantium" means when interpreted *correctly*. I could just as well have phrased it by saying that

(Y') "Sailing to Byzantium," properly interpreted, is really a lament about growing old and the proximity of death.

In other words, there is a normative aspect to (Y). But if that is the case, then it seems that no set of propositions about plain, non-normative facts could ever suffice to establish the truth of (Y'). The grounds of (Y') must include some normative claim about how the poem *ought* to be interpreted if it is to be interpreted correctly. And any defense of that normative claim would itself have to rely on further normative claims; indeed, there seems to be no point at which a claim of that sort could be defended or justified solely on the basis of plain facts. For

¹⁶ Dworkin (1986: 17).

anyone not prepared to reject the “is”/“ought” gap, it seems to follow that the plain-fact view of the grounds of (Y') is false.

A similar argument can be made in the legal case. Texts in statute books can be interpreted in all sorts of ways. But judges have to form their views about what statutory texts “say” or “mean” when interpreted correctly. Dworkin cites well-known examples of cases in which—as he construes them—judges disagreed about the outcome because they disagreed about what the pertinent statutory provision required “when properly read.”¹⁷ They disagreed, in other words, about how the “‘real’ statute” *ought* to be constructed from the relevant “text in the statute book.”¹⁸ As a consequence, they disagreed about which of several competing propositions of law correctly stated the law on the matter. They were thus disagreeing about the “grounds” of these propositions of law. Yet their disagreement was not about “any historical matters of fact.”¹⁹ The plain-fact view of the grounds of law must therefore be false.

So Dworkin’s point is sound. But can it really be that most legal philosophers ignored it before they read *Law’s Empire*? I already quoted a passage in which Dworkin characterizes the plain-fact view.²⁰ Other sentences he uses to describe this view—a “popular” view, he says²¹—include the following:

Law is a matter of plain fact.²²

Law is always a matter of historical fact.²³

The law depends only on matters of plain historical fact.²⁴

These are familiar-sounding claims about law. They are recognizable as claims associated with the tradition of legal positivism. And it is true that many theorists before and since *Law’s Empire* have endorsed some version of legal positivism. Dworkin has H. L. A. Hart’s theory principally in mind.²⁵ But what does legal positivism—or Hart’s theory at any rate—

¹⁷ Dworkin (1986: 16).

¹⁸ Dworkin (1986: 18).

¹⁹ Dworkin (1986: 23).

²⁰ See the quotation accompanying n. 9 above.

²¹ Dworkin (1986: 10).

²² Dworkin (1986: 8).

²³ Dworkin (1986: 9).

²⁴ Dworkin (1986: 31).

²⁵ Dworkin (1986: 34).

have to do with the plain-fact view of the grounds of law as Dworkin characterizes it? The answer, I should think, is “Nothing.” To see why, let us return to Dworkin’s analogy.

Suppose I put to you that

- (1) Poetry is always a matter of historical fact,

or even that

- (2) Poetry depends only on matters of plain historical fact.

Are these statements true? If we understand them, as would seem natural, as statements about poetry as a kind of activity or practice of both poets and their readers and interpreters—then yes, it would appear that these statements are true. We saw that the truth of a statement like (Y)—the sort of statement a reader of Yeats’s poem might make *qua* reader of poetry—does not depend only on matters of plain historical fact. But the activities of both readers and poets are themselves plain facts. That Yeats wrote “Sailing to Byzantium” is a plain fact. That some or even all readers subscribe to (Y) would be plain facts. Poetry exists as a practice because poets write poems and readers and critics read them and ask themselves questions like “What does this poem mean when properly interpreted?” and have certain feelings and dispositions towards poetry. Those are the kinds of facts that make up the activity or set of activities or practices that constitute poetry. So it seems plausible to think that statements (1) and (2) are true, indeed trivially true. But that tells us nothing about the grounds of propositions like (Y). That people *do* ask themselves what poems mean, and that they come up with answers to such questions—these are plain historical facts; but it does not follow that answers *to* such questions must themselves be given in terms of historical facts only. Statements (1) and (2) certainly do not entail anything like the plain-fact view of the grounds of propositions like (Y)—that is, the view that the grounds of any statement of the form “poem *p*, properly interpreted, means *m*” can only include plain facts.

Again, the same can be said of law. There would be no statutes without legislators, and no adjudication according to law without judges asking themselves questions of the form “What does this statutory provision, properly interpreted, mean?” Answers to such questions will characteristically feature as grounds of propositions of law, which are statements made,

as Dworkin puts it, from the “internal point of view” of a participant in legal practice.²⁶ Dworkin contrasts such a participant, whose interest is “practical,” with “the sociologist or the historian,” who from an “external point of view” are concerned with describing historical facts about the past and present actions and beliefs and dispositions of the members of that community. But why should we think that claims like (3), (4), or (5) below—which as we saw Dworkin attributes to “most legal philosophers”—are claims about the grounds of propositions of law, rather than claims about what law looks like from the external point of view?

(3) Law is a matter of plain fact.²⁷

(4) Law is always a matter of historical fact.²⁸

(5) Law depends only on matters of plain historical fact.²⁹

Let me try to bring out my point more clearly. Consider, for example, the claim made in (3). It is not as transparent as it might be. Let us unpack it slightly as the claim that

(3b) The existence of law is a matter of plain fact.

We can make it clearer. Rephrase (3b) as the claim that

(3c) Sentences of the form “There is [or “there exists”] law in community c”, if true, are true solely in virtue of plain facts.

or, better yet,

(3d) Sentences of the form “There is [or “there exists”] a legal system in community c”, if true, are true solely in virtue of plain facts.

Is (3d) true? Perhaps it is still equivocal. But what does seem to be true is that one characteristic use of sentences of the form “There is [or “there exists”] a legal system in

²⁶ Dworkin (1986: 13).

²⁷ See the quotation accompanying n. 22 above.

²⁸ See the quotation accompanying n. 23 above.

²⁹ See the quotation accompanying n. 24 above.

community c” is to refer to a particular social arrangement, the obtaining of which in a community is a solely a matter of plain facts. This is the sense in which a sociologist or an historian would use a sentence like that. In that sense, “There exists a legal system in community c” is an external statement that refers to plain facts. If we take it to refer to such external statements, then, (3d) is true.

Statements like (3), (4), and (5) can be naturally understood in this way. They can be understood as statements of the same sort of statements (1) and (2) above. They are statements about what law looks like from the external perspective of an observer; and the claim is that from that perspective, law is indeed a matter of historical fact; it is a social phenomenon, a matter of social fact. That then is what the majority of legal philosophers would seem to accept if Dworkin is right that the majority of legal philosophers accept (3), (4), or (5). But in that case Dworkin has no case against the majority of legal philosophers, for (3d) does not entail anything like the plain-fact view of the grounds of law. In fact, (3d) entails no view whatsoever regarding the grounds of law. (Nor is (3d) in itself a particularly interesting claim. The interesting challenge is to give an account of what social or historical facts do have to be in place for an external statement of the form “There is a legal system in community c” to be true. Different theorists may give different accounts.) Nor does Dworkin seem to believe that it does. He would agree that the claim that the sociologist’s or the historian’s external statements about law are statements of plain social fact does not imply that participants’ propositions of law—internal statements of what the law actually is on some given matter in some legal system—are themselves statements of plain social fact, or that their truth or correctness is solely a matter of plain social fact.

Why then should Dworkin think that other philosophers who endorse (3), (4), or (5) are thereby committed to the plain-fact view? I see two possible answers. Either Dworkin believes that those philosophers have misunderstood the implications of (3), (4), or (5); or he has himself misconstrued their views. The latter appears to be the case. Dworkin names H. L. A. Hart’s 1961 book *The Concept of Law* as “the most important restatement” of the idea that “law is a matter of historical fact.” Here is how he reports Hart’s take on this idea:

[Hart] said that the true grounds of law lie in the acceptance by the community as a whole of a fundamental master rule (he called this a “rule of recognition”) that assigns to particular people or groups the authority to make law. So propositions of law are true not just in virtue of the commands of people who are habitually obeyed, but more fundamentally in virtue of social conventions that represent the community’s acceptance of a scheme of rules empowering such people or groups to create valid law ...
[F]or Hart [the proposition that the speed limit in California is 55 miles an hour] is true because the people

in California have accepted, and continued to accept, the scheme of authority deployed in the state and national constitutions.³⁰

Consider this last statement, the statement that “the people in California have accepted, and continued to accept” a certain “scheme of authority.” This is what Dworkin would call an “external” statement. It describes or reports actions and attitudes of the people in California and what they happen to accept or recognize as law. It is a statement of plain fact.

By contrast, the statement that the speed limit in California is 55 miles an hour is an internal statement. It is a statement or proposition *of* Californian law. Now Dworkin claims that for Hart, this latter proposition true because of the former. “Because” is ambiguous, but Dworkin’s charge here is that Hart thought that internal statements of law are grounded solely—or at any rate “fundamentally”—in statements of plain fact. But the charge is unwarranted. Indeed, the point that Dworkin wants to press against Hart seems actually to be *taken* from Hart’s own work; as is, of course, the very distinction between “internal,” normative statements of law, and “external,” factual statements about law, which Hart introduced and defended.³¹ Hart does think that, generally speaking, there is no legal system in a community unless (to put it in Dworkin’s somewhat coarse terms) the “community as a whole” accepts a “rule of recognition” that “assigns to particular people or groups the authority to make law;” and this acceptance is taken to be a matter of historical fact. But that does not mean, and Hart did not think, that *that this fact is the case* is what “grounds” propositions of law, what makes propositions of law true or correct.

Am I misreading Hart? It is true that my reading is not entirely uncontroversial. But that is because Hart’s distinction between internal and external statements—a distinction that is central in his work—has too often been either misunderstood or just plainly overlooked, not least of all by authors who take themselves to endorse Hartian views.³² So let me say more

³⁰ Dworkin (1986: 34).

³¹ See Hart (1955a: 247-249); Hart (2012/1961: 88-91, 102-106).

³² Kevin Toh has done a great deal to set these matters straight over the past decade—see Toh (2005: 76-78, 110-114); (2007: 404-409); (2008: 451-461, 482-493); (2010: 1287-128); (2013: 459-463); (2015: 696-703)—but although his work is well-known, the relevant points have not been taken up in the literature as much as they should. Similar points have also been made in forceful terms by Pedro Múrias in a couple of pieces that are not as easily accessible (because they are written in Portuguese): see Múrias (2006); (2010). I have found Múrias’s and Toh’s discussions very helpful, even if there are several aspects of their analyses that I find unpersuasive.

about the topic, and try to offer my own reconstruction of the contrast between the two kinds of statements.

1.3. INTERNAL AND EXTERNAL STATEMENTS

1.3.1. *Particular Internal Statements*

It is by reference to the notion of a rule that Hart's distinction between internal and external statements can best be understood. Put legal rules to one side for a moment, and think instead of the rules of a game like football or cricket. Consider a statement that a player in the game is out. Hart says that the function of a statement like this is to assess a particular situation by reference to the rules of the game. A statement that a goal took place ("Goal!") is another example; another would be a statement that the score right now is 2-2.³³ In making statements like these, we are using a rule that we accept (and take others to accept) as appropriate for assessing the game: we are applying the rule to the ongoing game.

Statements of this sort are the paradigmatic instance of what Hart calls an internal statement.³⁴ When we make them, we are concerned with rules in a particular way: we *make use* of rules to assess particular cases by reference to them. I will call these statements "particular internal statements." Particular internal statements are one of two main species of internal statements, but before introducing the other species it will be helpful to draw the contrast with external statements.

1.3.2. *External Statements*

There are other ways of being concerned with the rules of a game. We may be interested in the history of the game. We may want to find out how its rules have changed over time, or what specific rules were in fact accepted and applied (and how) in different periods by players and referees and sports fans and commentators. In that case, we will be engaging with rules from the outside, as it were. Our questions will not be about *how to assess* any given situation in a game by reference to any set of rules that we accept as appropriate for that purpose. Rather, they will be questions about *what rules are (or have been) in fact accepted*

³³ See Hart (2012/1961: 102-103, 142-143).

³⁴ See Hart (2012/1961: 102-103).

and used by those who do engage (or have engaged) in rule-based assessments of actual games. To make this clearer, compare these two questions:

(Q1) Is player *p* out?

(Q2) What rule or rules do those engaged in assessing ongoing games accept as appropriate for determining whether a player is out?

Question (Q1) is an internal question. In answering it, one would be applying one of the rules of the game. An answer to (Q1) is an internal statement, a particular internal statement. By contrast, (Q2) is an external question. It is a question about the way in which those who engage with question (Q1) go about answering it: it is a question about how certain people actually go about answering internal questions. An answer to (Q2) is an external statement.

Hart's view is that (Q1) and (Q2) are questions of very different kinds. Question (Q2) is unequivocally an empirical question, a question of empirical social fact. *That* those who concern themselves with internal questions like (Q1) do engage with and apply certain rules when they go about answering those questions, is an empirical fact. So answers to (Q2)—external statements—are descriptive statements of fact. (Of course, (Q2) is only one among the numerous questions of fact that could be asked about how people answer questions like (Q1). What answers have they given on what occasions? Do they always agree? How often do they disagree? And so on. These are all external questions, and their answers would all be external statements of empirical fact.³⁵)

Answers to (Q1), in turn, are not empirical statements. They are, Hart says, “normative statements.” He also says that in answering internal questions we use language “normatively.”³⁶ In what sense are internal statements normative? There is no exegetically clear answer to this question, but the thought seems to be that questions like (Q1) are themselves normative questions; arguments offered in support of answers to such questions will characteristically include normative considerations: no such answer can be completely justified on the basis of empirical premises alone.³⁷ I say a bit more about this further below (in Section 1.3.11).

³⁵ See Hart (2012/1961: 89).

³⁶ See Hart (2012/1961: 117).

³⁷ See Hart (2012/1961: 140).

1.3.3. *General Internal Statements*

So suppose I am playing football or some other game, and that I want to answer question (Q1) with regard to a player in the other team. In answering question (Q1), I will be using and applying to a particular case a rule that I accept as being appropriate for that very purpose. My answer to (Q1) is not a statement *of* that rule. The rule that I use is *applied* in my answer, which is a particular internal statement (“Yes, player *p* is out”, “No, player *p* is not out”); the rule itself is left unstated. But I *could* give a statement of the rule that I accept as an appropriate rule to use in answering questions like (Q1) in the context of the game. I would then say something along the lines of “A player is out when ...”

Statements like these—statements *of* rules made by those who accept them as appropriate standards for the assessment of particular cases—are internal statements, too. I will call them “general internal statements.”

General internal statements have to be carefully differentiated from external statements reporting that *the rule is accepted* by a certain person or persons. In Hart’s words: “it is important to distinguish the *external statement of fact* asserting that members of society accept a given rule from the internal statement of the rule made by one who himself accepts it.”³⁸

1.3.4. *The Normal Context of Internal Statements*

I said that in the example of a player stating that another player in the game is “out,” the speaker is applying a rule that she accepts as appropriate for the purpose of assessing what counts as being out. That is indeed the normal context in which such statements are made: a context in which the speaker not only (a) herself accepts that the rule she is applying is the appropriate rule to use for that purpose, but moreover (b) takes her addressees to also accept that it is the appropriate rule to use.³⁹ These two facts—(a) and (b)—are also left unstated by the speaker; but if she utters the internal statement “He is out”, adding no caveat or qualification, then unless the context is abnormal her listener will be warranted in supposing

³⁸ Hart (2012/1961: 291, emphasis added).

³⁹ See Hart (2012/1961: 84-85, 142).

that both (a) and (b) are true; for what would be the “point” of making such an unqualified statement if either (a) or (b) were false?⁴⁰

Notice that (a) and (b) are straightforwardly factual propositions. That the speaker accepts, or takes others to accept, that a given rule is an appropriate to use for the purpose of assessing a given particular situation, is a matter of empirical fact. Notice also that the content of the presupposition mentioned in (b) amounts to an answer to the external question (Q2):

(Q2) What rule or rules do those engaged in assessing ongoing games accept as appropriate to determine whether a player is out?

We saw that an answer to (Q2) is an external statement. So in normal contexts, whoever makes an internal statement applying a given rule to some particular case can be said to presuppose the truth of the external statement that that rule is actually generally accepted as appropriate for that purpose.

What this means, however, is not that unless (a) and (b) are true, one cannot sincerely make a particular internal statement. One does not have to accept that a given rule R1 is the appropriate rule to apply, or to believe that others accept it, in order to sincerely put forth an internal statement applying R1 to a particular case. If I believe, or believe that others believe, that we should be using a different rule, R2, to assess whether or not a player is out, I am not thereby prevented from asking and answering the question whether player p is out when the situation is assessed in terms of R1. My answer will be a particular internal statement all the same. I should only take care to make it known to my listener—if context does not already make it clear—that either (a) or (b) or both are actually false in this instant case. Unless I actually wish to deceive my listener, I should cancel the implicatures that attach to the utterance of unqualified internal statements of this sort.⁴¹

⁴⁰ See Hart (2012/1961: 103-104).

⁴¹ Things appear to be different, though, with general internal statements, statements of rules. It seems that the sincere utterance of an unqualified general internal statement (“A player is out when ...”) involves the speaker’s own acceptance that *that* is indeed how things are to be done in the context of the game.

1.3.5. *Internal Statements of Legal Validity*

What about the law? Here, too, we can distinguish between external and internal statements, and, with regard to the latter, between particular and general internal statements.

One prominent class of internal statements in the legal domain is the class of statements that some rule is legally valid: “internal statements about the validity of rules,” as Hart calls them.⁴² These are particular internal statements, not general ones. They are statements applying a general rule governing what rules are valid (a “rule of recognition,” in Hart’s terminology), to a *particular* rule, which is declared to be valid (or invalid).⁴³ Such statements, in other words, give answers to questions like the following:

(Q3) Is rule *R* a legally valid rule?

In answering (Q3), a speaker will apply a rule of recognition *RR* which is itself “left unstated”⁴⁴ when the speaker utters her conclusion—her particular internal statement—that rule *R* is indeed a legally valid rule. But a speaker who thus applies a given rule *RR* that she accepts as appropriate for the purpose of answering a question like (Q3) can also, if needed, offer a statement *of* that rule *RR*. With regard to the issue of legal validity, then, a speaker can (a) offer a general internal statement of *RR* (which statement might take the form “A rule is legally valid when ...”) as well as (b) particular internal statements applying *RR* (which statements would take the form “Rule *R1* is legally valid,” “Rule *R2* is not legally valid,” and so on). (Hart sometimes gives “What the Queen in Parliament enacts is [valid] law” as an abbreviated formulation of a general internal statement of the rule of recognition of the British legal system.⁴⁵)

1.3.6. *The Variety of Internal Legal Statements*

Internal statements of legal validity are one class of internal statements that can be made with regard to the law. Another class that Hart highlights is the class of statements applying

⁴² Hart (2012/1961: 235).

⁴³ Hart (2012/1961: 101-103); see also Hart (1959: 167).

⁴⁴ Hart (2012/1961: 108, 293).

⁴⁵ Hart (2012/1961: 107, 111, 148).

legally *valid rules* to particular cases: for example, statements that a certain person *p* has a certain legal obligation or right, or statements that a particular transaction is legally valid.⁴⁶ Such statements are therefore particular internal statements. They apply a particular legal rule—a “primary,” legally valid rule—to a particular case. The corresponding *general* statement—a statement *of* the valid rule that the speaker is applying—is of course possible as well.

This means that for any actual instance of a decision applying a first-order, legally valid rule *R* to a particular case, we can discern four kinds or strands of internal statements:

- (1) A general statement of a rule of recognition *RR* accepted as appropriate to assess legal validity (“A rule is legally valid when ...”);
- (2) A particular statement applying *RR* to a particular case (“*R* is a legally valid rule”);
- (3) A general statement of rule *R* (for example, “Whoever ... is under the legal obligation to ϕ ”; “A will is legally valid when ...”);
- (4) A particular statement applying *R* to a particular case (“Person *p* is under the legal obligation to ϕ ”; “This will is legally valid”).

It is perhaps worth pointing out that there seems to be no implication from a *particular* internal statement of legal validity regarding some first-order rule *R* (that is, a statement like (2)) to the *general* internal statement *of* that rule *R* (that is, a statement like (3)). One can accept the rule that is *applied* in (2) while not accepting the rule that is *stated in* (3); and vice versa.⁴⁷

In what follows, I will concentrate on internal statements of (second-order) legal validity—that is statements like (1) and (2)—but some of the points I will make apply *mutatis mutandis* to first-order internal statements.

⁴⁶ Hart (2012/1961: 103-104).

⁴⁷ This point raises further issues that I cannot explore in this chapter. (It is unclear, for example, whether the sense in which one “accepts” a constitutive rule like the rule of recognition or a rule laying down the conditions for a valid will is the same sense in which one “accepts” a rule requiring that a certain action be performed or omitted.)

1.3.7. *The Normal Context of Internal Statements of Legal Validity*

The normal background or context in which someone makes an unqualified statement of the form “*R* is a legally valid rule” is the context in which the speaker is seeking to answer a question like (Q3) *understood as a question relative to the legal system that is actually in force* in the community to which both the speaker and her listeners belong.⁴⁸

Characteristically, the speaker (a) herself accepts the relevant rule of recognition *RR*, and (b) takes that rule to also be generally accepted by other members of the community as appropriate for the purpose of assessing the legal validity of particular rules. (The rule that she and others accept is the rule of recognition that she is applying—not the rule *R* to which she is applying it.)⁴⁹ So, again, (a) and (b) can be left unstated, and they will be taken by listeners to be true. Of course, these implicatures too can be canceled, for example if the speaker is concerned with assessing the validity of rules of systems which are in force elsewhere (systems of which the speaker or her listeners are not actually participants or subjects in any way) or of systems which are no longer (or have never been) in force anywhere.⁵⁰

Here, too, (a) and (b) are factual propositions. That the members of the community do actually accept the rule the speaker is applying as being the appropriate rule to employ in assessing whether certain rules are legally valid, is a matter of social fact. Indeed (b) involves an answer to the following, external question:

(Q4) What rule or rules do the members of our community in fact accept as appropriate for the purpose of determining which rules are legally valid?

⁴⁸ See Hart (2012/1961: 104-105, 295).

⁴⁹ See Hart (2012/1961: 108, 117-118).

⁵⁰ See Hart (2012/1961: 104): “[T]hough it is normally pointless or idle to talk about the validity of a rule of a system which has never established itself or has been discarded, none the less it is not meaningless nor is it always pointless. One vivid way of teaching Roman law is to speak as if the system were efficacious still and to discuss the validity of particular rules and solve problems in their terms.” It might also be worth noting that my proposed taxonomy is not meant to be exhaustive; and that the “general”/“particular” contrast does not map onto Joseph Raz’s well-known distinction between pure and applied (or applicative) legal statements: see Raz (1980/1970: 48, 217); (2009/1979: 62).

In normal contexts, then, a speaker who, applying a given rule of recognition *RR* to a particular case, asserts that a certain rule *R* is (or is not) legally valid, assumes the truth of the external statement that *RR* is in fact accepted as appropriate for the purpose of determining which rules are legally valid.⁵¹

1.3.8. *The Relation between External Statements about the Rule of Recognition and General Internal Statements of Legal Validity*

One of Hart's main claims is that we should not confuse a general internal statement of a rule of recognition *RR* with an external statement that *RR* is the rule that in a given community people actually do accept as the appropriate rule to assess whether particular rules are legally valid.⁵² We should thus take care not to confuse (A4) and (A1):

- (A4) In community *c*, the rule that is accepted as appropriate for the purpose of determining which rules are legally valid is the rule that whatever the Queen in Parliament enacts is valid law.
- (A1) In community *c*, whatever the Queen in Parliament enacts is valid law.

(A4) is a factual statement. It reports the empirical fact that people in a certain community accept a certain rule for a certain purpose. It is an external statement. What makes it external is not the fact that it explicitly refers to a certain community *c*, as though the speaker is considering it—the community—“from the outside”, as it were. What makes (A4) an external statement is that the speaker is concerned with *the rule* “from the outside;” the following statement would also be an external statement:

- (A4b) In *our* community, the rule that is accepted as appropriate for the purpose of determining which rules are legally valid is the rule that whatever the Queen in Parliament enacts is valid law.

⁵¹ See Hart (2012/1961: 108).

⁵² See Hart (2012/1961: 103): the “use of an accepted rule of recognition in making internal statements” is to be “carefully distinguished from an external statement of the fact that the rule is accepted”; or (2012/1961: 112): “[t]he ultimate rule of recognition may be regarded from two points of view: one is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law.”

Both (A4) and (A4b) are statements of fact. They are the sort of statements that could adequately be given as answers to questions like (Q4).

By contrast, (A1) is not a report of social facts at all. It has a very different meaning from (A4). (A1) is a statement that whatever the Queen in Parliament enacts *is* valid law in community *c*. It is or amounts to a statement that *that* is how validity *really is to be assessed* in community *c*. It is a general internal statement *of* the rule (and again, no less internal for the fact that it may be relative to a community other than the speaker's own).

To say that (A1) and (A4) have different meanings is not to say that they are unrelated. Indeed, it seems to have been Hart's view that *if* an external statement like (A4)—a statement that a certain rule of recognition *RR* is accepted—is true of a given community, then an internal statement like (A1)—a statement *of RR*—must also be true relative to the same community. But this thesis should not be misunderstood. The claim is *not* that no internal statement like (A1) can be true unless a corresponding statement like (A4) is true as well: Hart is clear that a legal system can exist even if as a matter of fact there is no convergence on any actual rule of recognition.⁵³ The claim, rather, is that *when* there is such convergence around a rule of recognition, then that *is* the rule of recognition of the community; and no statement *of* a different basic rule can then be correct.

1.3.9. *The Relation between External Statements about the Rule of Recognition and Particular Internal Statements of Legal Validity*

Things are different, however, when it comes to the relation between (A4) and any *particular* internal statement applying the rule—the rule of recognition—stated in (A1) to some particular rule. That there is general agreement among the members of a community that *RR* is the appropriate rule to use in assessing what rules are legally valid does *not* imply that there is general agreement about particular internal statements applying *RR* to particular rules. That may seem obvious. What may not be so obvious is that disputed or controversial particular internal statements of legal validity are still *internal statements of legal validity*.

It is well known that Hart held that for any given rule, there will always be particular cases in which it is uncertain whether the rule applies. In such cases, the application of the

⁵³ See Hart (2012/1961: 117-118, 122-123).

rule involves what he called a “fresh choice” on the decision-maker’s part.⁵⁴ The decision-maker’s is a discretionary judgment; nevertheless it is *still* a judgment aimed at determining whether the rule applies to the case in hand. In other words, the decision-maker’s answer to that question will still be a particular internal statement *applying the rule* to the particular case.

This important point is easy to overlook, in large part, no doubt, because in *The Concept of Law* Hart was not as clear about it as he might have been. It is often assumed that Hart’s view was that a case in which the relevant rule does not clearly apply—for example, a case in which the language of a statutory rule proves indeterminate—is a legally unregulated case to be decided by making new law rather than by applying any pre-existing legal rule. But that was not Hart’s view. He did hold that law is always partially indeterminate: that in any legal system there will be legally unregulated cases to which law provides no answer. But he did not think that “hard cases”—controversial cases in which no clear answer can be given on the basis of pre-existing rules—are *ipso facto* legally unregulated cases. On the contrary, he points out that when a judge is faced with a hard case, very often there are considerations that can be relied upon (and which judges do characteristically rely upon) to warrant the conclusion that the legal rule does apply to the particular case. Arguments by analogy appealing to “many complex factors running through the legal system and [to] the aims or purpose which may be attributed to a rule,”⁵⁵ the use of “canons of interpretation,”⁵⁶ and appeals to legal principles, are examples of considerations characteristically relied upon by judges as a “reasoned basis for decision” in hard cases.⁵⁷ To say that when the judge applies a legal rule to the case at hand on the basis of considerations of this kind, “the conclusion ... is in effect a choice,”⁵⁸ is not to say that the judge is making law *rather than applying* pre-existing law. The exercise of discretion is required not because the rule does not apply, but because “there are reasons both for and against” holding that it applies;⁵⁹ the judge’s conclusion, which may well be controversial, will still amount to a particular internal statement *applying the rule* (“Rule *R* is valid,” “Person *p* has an obligation to ϕ ”).

⁵⁴ 54 Hart (2012/1961: 128).

⁵⁵ Hart (2012/1961: 127).

⁵⁶ Hart (2012/1961: 126).

⁵⁷ Hart (2012/1961: 204-205).

⁵⁸ Hart (2012/1961: 127).

⁵⁹ Hart (2012/1961: 123, 127).

Controversial “hard cases,” then, are *not* the sort of cases that Hart has in mind when he says that law is always indeterminate, that law always leaves some cases unregulated.

Hart came to acknowledge that the point could have been more plainly made in *The Concept of Law* and in some earlier essays; but he took the opportunity to clarify his views. Thus in the “Introduction” to his *Essays in Jurisprudence and Philosophy* he says that

[I]t may seem from what I wrote ... that I thought that judges, when they reach a point at which the existing settled law fails to determine a decision either way, simply push aside their law-books and start to legislate de novo for the case in hand without further reference to the law. In fact this has never been my view ... [A]mong the features which distinguish the judicial from legislative law-making is the importance characteristically attached by courts, when deciding cases left unregulated by the existing law, to proceeding by analogy so as to ensure that the new law they make is in accordance with principles or underpinning reasons which can be recognized as already having a footing in existing law. Very often in deciding such cases courts cite some general principle or general aim or purpose which a considerable area of the existing law can be understood as exemplifying or advancing, and which points towards a determinate answer for the instant case ... [T]he search for and use of principles underlying the law defers the moment, [though] it cannot eliminate the need for judicial law-making.⁶⁰

And also:

[T]he question whether a rule applies or does not apply to some particular situation of fact is not the same as the question whether according to the settled conventions of language this is determined or left open by the words of that rule. For a legal system often has other resources besides the words used in the formulations of its rules which serve to determine their content or meaning in particular cases. Thus ... the obvious or agreed purpose of a rule may be used to render determinate a rule whose application may be left open by the conventions of language.⁶¹

In the “Postscript” to *The Concept of Law*, Hart is also quite clear that legally unregulated cases “are not merely hard cases, controversial in the sense that reasonable and informed lawyers may disagree about which answer is legally correct;”⁶² and again he makes the point that when particular statutes or precedents prove indeterminate, or when the explicit law is silent, judges do not just push away their law books and start to legislate without further guidance from the law. Very often, in deciding such cases, they cite some general principle or

⁶⁰ Hart (1983: 6-7, emphasis added).

⁶¹ Hart (1983: 7-8, emphasis added); see also Hart (1967: 107).

⁶² Hart (2012/1961: 252).

some general aim or purpose which some considerable relevant area of the existing law can be understood as exemplifying or advancing and which points towards a determinate answer for the instant hard case. This indeed is the very nucleus of the “constructive interpretation” which is so prominent a feature of Dworkin’s theory of adjudication. [T] his procedure certainly defers, [though] it does not eliminate the moment for judicial law-making.⁶³

This point holds with regard to *any* rules: not merely with regard to the application of *valid* legal rules to particular cases, but equally with regard to the application of rules of recognition to particular rules. Doubts can arise as to the “meaning or scope” of a rule of recognition;⁶⁴ there will always be particular cases—particular candidate rules—relative to which the application of the rule of recognition does not yield a clear result. Different decision-makers may then diverge on their assessments of the validity of such rules, and each will be ready to offer reasons in support of their conclusion. The fact that they do diverge—and more generally the fact that there is no widespread agreement on how to treat those particular cases—does not mean that a statement applying the rule of recognition to the hard case (“This is a valid rule”) cannot be true or correct.

The lesson to draw is this. We saw that a speaker who applies a rule of recognition and makes a particular internal statement of legal validity can normally be taken to assume that the rule *being applied* is generally accepted by others in the group or community. But as we now see, there is no further assumption that others agree (or are disposed to agree) with the speaker’s actual application of the rule as conveyed by particular internal statement.

Agreement at the level of the rule being applied does not translate into agreement at the level of the particular statement of validity (and *a fortiori* it does also not translate into

⁶³ Hart (2012/1961: 274-275, emphasis added). The publication of Hart’s recently discovered 1956 essay “Discretion” confirms that that had indeed always been his view even before 1961. In this essay, Hart distinguishes “discretion” from mere “choice”; he characterizes the exercise of discretion in terms of a reasoned or principled attempt to ascertain whether the legal rule does apply despite the fact that it does not clearly “yield a unique answer;” and he specifically includes “disputable questions of interpretation of statutes or written rules”—the sort of questions that give rise to Dworkinian “theoretical disagreements”—within the domain of questions that call for discretion in this sense: see Hart (2013/1956: 656). He had also pointed out in Hart (1959: 168-169) that (a) there is no reason to suppose that “normative internal statements”—including “legal statements of rights and duties or validity”—are all deducible from clear determinate rules [in combination with statements of fact], and that (b) such statements—*internal* statements—are made in clear cases *as well as* in “the more debatable area of penumbra.”

⁶⁴ Hart (2012/1961: 148).

agreement at the level of any first-order conclusion applying the *valid* rule to any particular case).

1.3.10. *The “Existence” of Legal Rules and Legal Systems*

A statement that a given rule “exists” in a given community is ambiguous, according to Hart: it can be understood either as an external or as an internal statement.⁶⁵ One thing a speaker might mean by it is that in a given community a certain mode of behavior is in fact accepted as a standard and generally used by its members. That is the sense in which one might interpret the assertion (made at the time of Hart’s writing) that “in England a rule exists that we must bare our head on entering a church.”⁶⁶ This is an external statement (and again, what makes it external is not the fact that it explicitly mentions the community—England—to which it refers, but rather the fact that what is meant by the statement is that certain social facts obtain).⁶⁷

But we can also say that a rule exists to mean that a (legal) rule is *valid*—and to say that a rule is valid is to make an *internal* statement applying a rule of recognition *to* that particular rule.⁶⁸ We should therefore distinguish, for any given legal rule, between two questions: the *internal* question about whether the rule is valid, and the *external* question about whether the rule is in fact accepted and complied with by the members of the community in general. Some rules, however, cannot by their very nature be said to be either valid or invalid. The rule of recognition of a legal system is one of them. It can therefore be said to “exist” only in the external sense; “the assertion that it exists can only be an external statement of fact ... [It] exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria.”⁶⁹

A similar ambiguity affects statements that a *legal system* “exists”. These statements, too, can have both external and internal readings. In the external sense, such a statement is a *factual assertion* that refers to “a number of heterogeneous social facts” which are said to be in place “in a given country or among a social group.”⁷⁰ But the assertion that a legal system

⁶⁵ See Hart (2012/1961: 109-110).

⁶⁶ Hart (2012/1961: 109).

⁶⁷ See also Hart (2012/1961: 145-146).

⁶⁸ Hart (2012/1961: 110).

⁶⁹ Hart (2012/1961: 110).

⁷⁰ Hart (2012/1961: 112).

“exists” can also be an *internal* statement of law “made from the point of view of one legal system about another, accepting the other system as ‘valid’.”⁷¹

Now Hart’s core aim in *The Concept of Law* is to offer an account of the “complex social situation”⁷² that has to be in place for an external statement that a legal system exists to be true.⁷³ Hart’s core aim, in other words, is to offer an analysis of external statements of the form “there exists a legal system in community *c*.” As is well known, he characterizes the relevant social phenomenon as involving two “aspects”: general obedience by the bulk of the population to those laws that are valid by the system’s tests of validity,⁷⁴ and (at least in normal cases) a “unified or shared official acceptance of the rule of recognition containing the system’s criteria of validity.”⁷⁵ As should now be obvious, this analysis does not (and is not meant to) give us an analysis of either particular internal statements of legal validity, or internal statements of (or applying) first-order legally valid rules.

1.3.11. *The Normative Character of Internal Statements*

As I said, what Hart means by the “normative” character of internal statements of law is not fully clear. But there is no doubt that he took internal statements to be normative in a sense that contrasts sharply with the purely factual character of external statements about law.

Indeed he explicitly contrasts statements *of law* with statements *of fact*,⁷⁶ and asserts that there are “*radical* differences between statements of law which operate within a system of rules and a statement of fact.”⁷⁷ He speaks of the “internal non-factual, non predictive uses of language inseparable from the use of rules,”⁷⁸ and says that internal statements involve the “normative use” of language.⁷⁹ He denounces the “constant pull” towards an analysis of legal

⁷¹ Hart (2012/1961: 296-297; see also 121-122).

⁷² Hart (2012/1961: 100).

⁷³ See Hart (2012/1961: v, 112-115, 117-118, 201).

⁷⁴ Hart (2012/1961: 114).

⁷⁵ Hart (2012/1961: 114-115).

⁷⁶ Hart (2012/1961: 58-59, 118-119).

⁷⁷ Hart (1955b: 372, emphasis added). See also Hart (1959: 166) for the similar claim that external and internal statements are “two *radically different* types of statement for which an opportunity is afforded whenever a social group conducts its affairs by rules” (emphasis added).

⁷⁸ Hart (1959: 167).

⁷⁹ This point should not be confused with the further claim that “normative language” is used in *some* first-order internal legal statements: see Hart (2012/1961: 57, 85). Normative language is *not* the distinctive sign of

discourse in terms of “fact-stating” discourse,⁸⁰ and rejects any reductionist analyses that suppress the “normative aspect” of propositions of law.⁸¹ He says that propositions of law have “normative force,” and that “a central task of legal philosophy” is to explain this “normative force of propositions of law.”⁸² He says that “ought-propositions” cannot “be dispensed with in the analysis of legal thinking,” indeed in the “elucidation of the internal aspect of any normative discourse.”⁸³ And he suggests that there is a logical divide between the two kinds, preventing the very possibility of “conflict” between external and internal statements.⁸⁴

1.4. FINAL REMARKS ON THE PLAIN-FACT VIEW

Can I rest my case? Dworkin is right that the plain-fact view is false. It is not true that internal statements of law can all be shown to be true or correct on the basis of factual, external statements alone. So what? He is wrong that legal positivists—or at least positivists who hold something like Hart’s views—have endorsed it. On the contrary, it seems that Hart rejected (or would have rejected) the plain-fact view for very much the same reasons that Dworkin tries to use against him.

2. Theoretical Disagreement and the Social Fact Thesis

2.1. DWORKIN ON “NORMATIVE” RULES

But hold on. Even if I am right about Hart, am I not being too quick to dismiss Dworkin’s claim that legal positivists are unable to make sense of the phenomenon of “theoretical

the normative character of internal statements. Consider, for example, that statements of legal validity (“This is a valid rule”) are explicitly offered by Hart (2012/1961: 117) as illustrations of the “characteristic use of normative language.” Or note, for another example, that Hart clearly takes statements like “He is out” in cricket to be just as normative, even though no normative terminology is used. Besides, normative terminology can feature in external statements as well (“In community *c*, they accept the rule that they *must* ϕ ”, etc.).

⁸⁰ Hart (2012/1961: 98-99).

⁸¹ Hart (1983: 13).

⁸² Hart (1983: 18).

⁸³ Hart (1959: 166).

⁸⁴ Hart (2012/1961: 122).

disagreement?” Is Dworkin’s challenge not supposed to constitute a powerful objection against positivism? Have legal positivists not taken it seriously themselves?

Some have. They would accuse me of missing Dworkin’s point. In fact, Scott Shapiro thinks *most* people missed it. Here is how—in a relatively recent and well-known essay that succeeded in rekindling legal theorists’ interest in the topic—Shapiro articulates Dworkin’s “objection from theoretical disagreements”:

The plain-fact view [of the grounds of law], according to Dworkin, consists of two basic tenets. First, it maintains that the grounds of law in any community are fixed by consensus among legal officials. If officials agree that facts of type *f* are grounds of law in their system, then facts of type *f* are grounds of law in their system. Second, it holds that the only types of facts that may be grounds of law are those of *plain historical fact*. As Dworkin convincingly argues, the plain-fact view cannot countenance the possibility of theoretical disagreements. For if, according to the first tenet, legal participants must always agree on the grounds of law, then it follows that they cannot disagree on the grounds of law.⁸⁵

“According to [the plain-fact view’s] first tenet,” Shapiro says elsewhere, “a fact *f* is a ground of law only if there is agreement among legal officials that it is a ground of law”:

Disagreements among legal officials about whether *f* is a ground of law, therefore, are incoherent: without consensus on whether *f* is a ground of law, *it is not a ground of law*.⁸⁶

Shapiro says this was Dworkin’s objection in Chapter One of *Law’s Empire*. I do not see much textual evidence to support this attribution. What Shapiro calls the “first tenet” of the plain-fact view is not something Dworkin explicitly articulates as such, as far as I can tell.⁸⁷ But it is true that something like this objection had already been pressed by Dworkin in his essay “The Model of Rules II,” which discusses Hart’s characterization of a legal system’s rule of recognition as a “social rule.” Dworkin claims in that 1972 essay that a social

⁸⁵ Shapiro (2007: 37).

⁸⁶ See Shapiro (2011: 286).

⁸⁷ Shapiro gives no page references. Perhaps something like Shapiro’s “first tenet” might be reconstructed from Dworkin’s discussion of “semantic theories of law” which “suppose that lawyers use mainly the same criteria ... in deciding when propositions of law are true or false:” see Dworkin (1986: 33); but that is already part of Dworkin’s “semantic sting” discussion, and Shapiro thinks that Dworkin makes his objection from theoretical disagreement *before* he advances the “semantic sting” argument: see Shapiro (2007: 54 n. 57). On the relation between the two arguments, see Smith (2010: 644-648).

“practice” of the sort that Hart describes as amounting to the existence of a “social rule” in a community is consistent with widespread controversy among the members of the group about what it is that the rule really requires:

[Hart’s] social rule theory ... cannot explain the fact that even when people count a social practice as a necessary part of the grounds for asserting some duty, they may still disagree about the scope of that duty.

Suppose, for example, that the members of the community which “has the rule” that men must not wear hats in church are in fact divided on the question of whether “that” rule applies to the case of male babies wearing bonnets. Each side believes that its view of the duties of the babies or their parents is the sounder, but neither view can be pictured as based on a social rule, because there is no social rule on the issue at all.⁸⁸

Dworkin’s point is not that this controversy regarding babies ought to prevent a sociologist from saying of this community that they have the rule—the social rule—that men must not wear hats in church. Dworkin’s point is that the “content” of the social practice that might warrant this external statement—namely, that men do normally remove their hats in church, and recognize that they ought to do so, and are criticized (and recognize this criticism as justified) when they happen not to remove their hats in church⁸⁹—does not necessarily coincide with the content of the rule—the “normative rule”—that each member of the group might assert “in the name” of the practice:⁹⁰

If a community has a particular practice ... like the no-hat-in-church practice, then it will be likely, rather than surprising, that members will assert different normative rules, each allegedly justified by the practice ... It is true that they will frame this dispute, even in this trivial case [regarding whether male babies may wear bonnets in church], as a dispute over what “the rule” about hats in church requires. But the reference is not to the rule that is constituted by common behaviour, that is, a social rule, but to the rule that is justified by common behaviour, that is, a normative rule. They dispute precisely about what *that* rule is.⁹¹

Disagreement, then, does not prevent each participant from offering statements of what they take the rule to require. Indeed, disagreement *manifests itself* in the form of competing

⁸⁸ Dworkin (1977: 54).

⁸⁹ Dworkin (1977: 50).

⁹⁰ Dworkin (1977: 58).

⁹¹ Dworkin (1977: 58).

statements of what the rule requires. But it does prevent the sociologist from asserting the existence of a social rule on the disputed issue:

[I]f half the churchgoers claim that babies are required to take off their bonnets and the other half denies any such requirement, what social rule does this behaviour constitute? We cannot say either that it constitutes a social rule that babies must take off their bonnets, or a social rule that provides that they do not have that duty.⁹²

The same holds for law: disagreement among participants, Dworkin says, is inconsistent with “the concept of a social rule, as Hart uses that concept”:

If judges are in fact divided about what they must do if a subsequent Parliament tries to repeal [by a simple majority] an entrenched rule [itself enacted by a simple majority], then it is not uncertain whether any social rule governs that decision; on the contrary, it is certain that none does.⁹³

But why does Dworkin press this point against Hart? The answer is again that Dworkin misrepresents Hart’s views on the difference between external and internal statements when he claims that for Hart an internal statement of a normative rule cannot be true or correct unless an external statement of a social rule *with the same content* is true. Dworkin actually depicts Hart as *denying* that external and internal statements differ semantically. In Hart’s view, Dworkin asserts, *both* kinds of statement assert that the factual “practice-conditions” are met, and the only difference between the sociologist and the participant or member is that the latter also “displays” his “acceptance of the [social] rule as a standard for guiding his own conduct and for judging the conduct of others.”⁹⁴

But this, as we saw, is not Hart’s view at all. Observe, first, that for Hart particular internal statements—statements applying general rules to particular cases—are emphatically *not* statements *that* the relevant rule is in fact accepted by the speaker or anyone else in the group. Nor does the truth or correctness of any particular internal statement depend for Hart on the fact that anyone else in the group (let alone the group as a whole) agrees that the internal statement is true or correct. Internal statements are statements of what the speaker

⁹² Dworkin (1977: 54).

⁹³ Dworkin (1977: 62); the example is Hart’s: see Hart (2012/1961: 149-150).

⁹⁴ Dworkin (1977: 51).

thinks *is* right,⁹⁵ not of what she thinks everyone else thinks is right. Particular internal statements can be true or correct even if they *are* widely disputed; and indeed no rule is such that its application to particular cases can leave no room for reasonable controversy.⁹⁶

Second, Hart does say that two participants who disagree about what some rule requires in a particular case are still disagreeing about applications of “the” same rule, and one could think, with Dworkin, that this misdescribes what is going on. If participants disagree about what is required, then they do not really converge on the “same” rule. But that is beside the point. The point is that if Hart refers to conflicting particular internal statements as statements applying the same rule, then it cannot be his view that what each participant takes to be the content of the rule (as Dworkin understands it) is exclusively “fixed”—Shapiro’s verb—by agreement or convergent practice. Put differently: it is neither necessary nor likely that the content of what each participant would give as *her* considered internal statement of the group’s rule coincides exactly with the content of what a sociologist would describe, on the basis of the group’s convergent practice, as the rule that the group “has”.⁹⁷ This is Dworkin’s point—but Hart’s view is consistent with it.⁹⁸

So Dworkin’s argument that legal positivists must think that theoretical disagreements are incoherent, as Shapiro puts it, is predicated on the same false assumption that underpinned the argument from *Law’s Empire* that I discussed in Section 1. Both objections hinge on the false claim that positivists—or Hart at any rate—fail to adequately differentiate between external and internal statements. Both objections can therefore be dismissed for the very same reason.

⁹⁵ Hart (2012/1961: 116).

⁹⁶ Hart (2012/1961: 123).

⁹⁷ Notice that this is *not* to say that collective practices are normatively irrelevant from the participant’s point of view: see Waluchow (2011: esp. 373-379).

⁹⁸ Hart also observes that in the case of rules for which there is no authoritative linguistic formulation, there is no clear line between the uncertainty of a particular rule vis-à-vis some hard case, and the uncertainty of the criterion used to identify the rule itself: see Hart (2012/1961: 148). Notice that Dworkin seems to be assuming that any adequate internal statement, by a participant, of the relevant rule would either clearly include, or clearly exclude, the controversial case. But why should that be? Hart’s view seems to be instead that even after a participant has made up her mind about some controversial case, her general statement *of* the corresponding rule could (and probably would) still be articulated in such a way as to leave the controversial case unsettled. Why should we think that a participant’s general statement of what she takes to be a rule of her community will *change* every time she reaches a conclusion about the applicability of the rule to some hard case?

2.2. WHY A DEBUNKING STRATEGY WILL NOT WORK

Yet Shapiro does not dismiss Dworkin's objection. On the contrary, he thinks it is a "vastly ... effective" objection against legal positivism.⁹⁹ Others have agreed. That raises the suspicion that these theorists may themselves be unwittingly flouting the distinction between external and internal statements. If that is true, they are making the very mistake that Dworkin had falsely attributed to Hart, and which Hart himself had originally denounced. What is more, it is a mistake that these theorists are making *in the name* of Hartian positivism. Some of their arguments confirm this suspicion. Brian Leiter, for example, takes Shapiro's statement of Dworkin's objection seriously:

[A Dworkinian] theoretical disagreement is a disagreement about criteria of legal validity, that is, about the *content* of what Hart calls the rule of recognition. But the rule of recognition, on Hart's view, is a social rule, meaning its content—that is, the criteria of legal validity—is fixed by a complex empirical fact, namely the *actual practice* of officials (and the attitude they evince towards the practice). So it looks like the only dispute about the criteria of legal validity that is possible, on Hart's view, is an empirical or "head count" dispute: namely, a dispute about what judges are doing, and how many of them are doing it, since it is *the actual practice of officials and their attitudes towards that practice* that fixes the criteria of legal validity.¹⁰⁰

Since Leiter agrees that judges "engaged in Dworkinian theoretical disagreements ... are *not* engaged in an empirical dispute about how their colleagues on the bench typically or generally resolve disputes,"¹⁰¹ he thinks legal positivists need to be able to explain *away* such disagreements. Leiter acknowledges that judges who disagree, for example, on how to construe a statutory provision do write "*as if* there is a fact of the matter about what the law is, even though they disagree about the criteria that fix what the law is."¹⁰² Legal positivism is therefore unable to "vindicate what it *appears* [judges] are disagreeing about."¹⁰³ But Leiter bites the bullet. He thinks that legal positivists can still refuse to take the character of these disagreements at face value. There are two candidate explanations positivists can offer.

⁹⁹ Shapiro (2011: 288).

¹⁰⁰ Leiter (2009: 1222).

¹⁰¹ Leiter (2009: 1222-1223).

¹⁰² Leiter (2009: 1223).

¹⁰³ Leiter (2009: 1223).

They can say that parties to these disagreements are being disingenuous. Or they can say that if judges do “honestly think there is a fact of the matter about what the grounds of law are,” then judges are simply *wrong* about that: “in truth there is no fact of the matter about the grounds of law in this instance *precisely because* there is no convergent practice of behavior among officials constituting a Rule of Recognition on this point.”¹⁰⁴

This move is unsatisfactory. To see why, consider first this other claim of Leiter’s:

Why should a theory of law be organised around the phenomenon of theoretical disagreements about law, absent some showing—nowhere to be found in Dworkin’s corpus—that it is somehow *the* central (or even *a* central) feature of law and legal systems? ... Even if we agreed with Dworkin that legal positivism provided an unsatisfactory account of theoretical disagreement in law, this would be of no significance unless we thought that this phenomenon was somehow central to an understanding of the nature of law and legal systems.¹⁰⁵

The truth, Leiter says, is that “there is *massive* and *pervasive* agreement about the law throughout the system.”¹⁰⁶

Theoretical disagreements about law represent only a miniscule fraction of all *judgments* rendered about law, since most judgments about law involve *agreement*, not disagreement.¹⁰⁷

That, he says, is “the most striking feature about legal systems,”¹⁰⁸ and it tells in favor of positivism:

One of the great theoretical virtues of legal positivism as a theory of law is that it ... explains the pervasive phenomenon of *legal agreement*. Legal professionals agree about what the law requires so often because, in a functioning legal system, *what the law is* is fixed by a discernible practice of officials who decide questions of legal validity by reference to criteria of legal validity on which they recognizably converge ... legal positivism makes happy sense of the *overwhelming majority of legal phenomena*.¹⁰⁹

¹⁰⁴ Leiter (2009: 1224, my emphasis).

¹⁰⁵ Leiter (2009: 1220).

¹⁰⁶ Leiter (2009: 1227).

¹⁰⁷ Leiter (2009: 1226).

¹⁰⁸ Leiter (2009: 1247).

¹⁰⁹ Leiter (2009: 1228).

This is an odd claim for Leiter to make against Dworkin. We can of course agree with Leiter that “massive agreement about law—not disagreement—is the norm in modern legal systems.”¹¹⁰ Others have drawn attention to that fact in discussions of Dworkin’s views. Matthew Kramer, for example, points out that no legal system is viable without a substantial measure of regularity and predictability regarding the legal consequences of people’s actions:

If serious controversy is typical rather than exceptional—that is, if the legal consequences of people’s multitudinous actions are ordinarily (rather than occasionally) “up in the air” and truly murky—then “lawlessness” is the correct designation for such a state of affairs.¹¹¹

Notice, however, that the statement in this passage is an external statement. Or rather, it is a general second-order statement about what as a matter of fact must (not) be the case in any community for the external statement that *that community has a legal system* to be true. Now it would seem that Kramer is right that an external claim that some given community has a legal system is perfectly compatible with the fact that participants sometimes or even often disagree about what the law requires, provided that disagreement does not pervasively extend to every ordinary legal question or outcome. But is that a good point to press against Dworkin’s objection? Not for someone who, like Leiter (but unlike Kramer), thinks that Dworkin’s objection should be understood as Shapiro suggests.¹¹² In Shapiro’s formulation, after all, Dworkin’s objection is not that disagreement in modern legal systems is in fact rampant, pervasively affecting the vast majority of legal issues that arise. (Nor is the objection that positivists make the false empirical claim that disagreements just happen, as a matter of contingent fact, not to occur.) Dworkin’s objection, as Shapiro casts it, is that positivists are committed to denying the very possibility of theoretical disagreements. Theoretical disagreements, remember, are supposed to be an incoherent phenomenon.¹¹³ So the empirical frequency of disagreements is neither here nor there. A single instance of theoretical disagreement can be used a counter-example to the positivist claim understood as Shapiro and Leiter understand it.¹¹⁴

¹¹⁰ Leiter (2009: 1228).

¹¹¹ Kramer (1999: 142); see also (2013: 47-49).

¹¹² For another example of an attempt to rely on the allegedly low frequency of disagreements in support of a debunking strategy, see Shecaira (2012: esp. 137-142).

¹¹³ See the quotation accompanying n. 86 above.

¹¹⁴ Tim Dare (2010: 6) makes this point as well.

In fact, the very emphasis on frequency is misguided. The phenomenon of theoretical disagreements itself is not what supposedly needs to be explained and legal positivism fails to explain. What needs to be explained is what the phenomenon of theoretical disagreements is *evidence of*—namely, that judges do not think that the truth or correctness of their statements of law depends on everyone else or even a majority agreeing with them. And of course if that is true, it is true across the board: it is true not merely of statements that happen in fact to be controversial, but equally of statements of law with which everyone else agrees.¹¹⁵ Think of a judge who quickly disposes of a case she finds clear because, for example, it falls squarely within the “plain meaning” of some statutory provision and no other considerations arise. Is she not committed to the claim that that outcome is indeed what the statute requires when *properly* interpreted? Perhaps everyone agrees with her; but again *that everyone agrees* is neither what the judge’s internal statement asserts, nor what makes her statement true or correct.¹¹⁶ So if Dworkinian theoretical disagreements do exist, then Leiter’s legal positivist—far from making “happy sense of the overwhelming majority of legal phenomena”—will in fact fail to explain cases of massive agreement *as well as* cases of theoretical disagreement, regardless of their relative frequencies.

This means that Leiter’s debunking attempt to explain away theoretical disagreements as instances of either disingenuity or error is much weaker than he supposes, since it does imply—differently from what he claims¹¹⁷—that legal discourse is systematically mistaken. Leiter himself would agree that this is reason to think that an *error-theory* account of

¹¹⁵ This is not to say that underlying what appears to be massive agreement about the outcomes of most cases there is a “deeper” theoretical disagreement: compare Leiter (2009: 1228-1229). The explanation of any given instance of outcome-agreement may be that it is the reflection of widespread theoretical *agreement* among judges: that judges do agree on what they take to be the “grounds” of most propositions of law, though they do not hold those views because (or at any rate only because) others do or would agree with them. For a recent discussion (focusing on Leiter’s views) of what explanations of agreement in law involve, see Smith (2015).

¹¹⁶ Dworkin phrases this point vividly if somewhat misleadingly: “[I]t is implausible to think that any judge’s convictions that he ought to decide cases in a ‘proper’ way depend on the convergent behavior of other judges. A judge would think he should decide in a proper way whatever other judges do or think. What is the alternative? Deciding improperly?” See Dworkin (2002: 1661). Dworkin’s phrase is misleading because the question is not whether a judge thinks she should *decide in a proper way* whatever other judges do or think *about that* (that is, about whether she should *decide in a proper way*). The question is whether the reason she thinks her decision is *the* proper decision is the fact that other judges agree that it is indeed the proper decision to make.

¹¹⁷ See Leiter (2009: 1226, 1232).

disagreements must be false; and given that the truth of the error-theory account is presupposed by the disingenuity account,¹¹⁸ the latter must be false as well.

2.3. THE SOCIAL FACT THESIS

The motivation behind debunking strategies like Leiter's is to defend what Shapiro refers to, as we saw, as the "first tenet" of the legal positivist's plain-fact view—the claim that "the grounds of law in any community are fixed by consensus among legal officials."¹¹⁹ This claim, in turn, is one version of what Shapiro calls the "Social Fact Thesis," which says that

the existence and content of the law are ultimately determined by certain facts about social groups. Legal facts are grounded, in the final analysis, on social, not moral, facts.¹²⁰

But a moment's reflection reveals that this thesis is unhelpfully equivocal.¹²¹ It can be understood in two very different ways, and the preceding discussion can now help us to see why.

One way of reading the Social Fact Thesis is to understand it as a thesis of the same *kind* as, say, Hart's thesis that "the foundation of a legal system is an accepted rule of recognition specifying the criteria of legal validity."¹²² This is a general thesis about legal systems, not a thesis about any particular system. It is true if and only if, for every legal system *L* (or for every normal or central case of a legal system), a certain subset of the participants of *L* accept a rule of recognition specifying the criteria of legal validity; and Hart is clear that to say *this* of any legal system is to make an "external statement of fact."¹²³

Many people would indicate this thesis as distinctive of Hart's legal positivism: as his own version of the Social Fact Thesis. But notice the precise role that this thesis plays in Hart's theory. It gives us an account of the sort of facts—social facts—that have to be in place for any *external* statement that in some given community "there is" or "there exists" a legal system (or that they "have" a legal system) to be true. It gives us, in short, an account of

¹¹⁸ Leiter (2009: 1224).

¹¹⁹ Shapiro (2007: 37).

¹²⁰ Shapiro (2007: 33). See also Coleman (2002: 75).

¹²¹ See also Toh (2008: 451-456, 479-493).

¹²² Hart (2012/1961: 148).

¹²³ Hart (2012/1961: 111-112).

the truth-conditions of statements about the “existence” of a legal system in some community, where “existence” is understood from the external perspective of an observer or sociologist. These truth-conditions are indeed a matter of plain, historical, social fact. This would suggest that legal positivism and the Social Fact Thesis in particular can be plausibly understood as claims of this sort—as claims about the truth-conditions of external statements about the existence of law or a legal system.¹²⁴

But does it follow that the grounds of internal statements of legal validity—or, more generally, the grounds of statements of what the law actually *is* on any matter in any actual system—are exhausted by considerations of social fact? The answer, of course, is “No.” The external statement “In England they recognize as law whatever the Queen in Parliament enacts” does not entail that the truth or correctness of internal statements of English law “depends” or is any way necessarily “grounded” in or “fixed” by social facts only. As we saw in Section 1, in fact, Hart would *deny*—and I think rightly—that the truth or correctness of *internal* statements of law could ever be solely a matter of social facts.

Shapiro’s formulation of the Social Fact thesis equivocates between these two senses in which one could claim that the “existence and content of the law” are “ultimately determined” by (or “grounded, in the final analysis,” in) “social facts.” It could simply be read as a thesis about the truth-conditions of external statements about law, in which case one might agree that the Social Fact Thesis has a strong claim to being true. But if the reference to what “grounds” or “determines” the “existence and content of the law” is understood as a reference to the truth-(or correctness-) conditions of *internal* statements of law as made by participants in a legal system—if it is understood as a reference to what *Dworkin* called the “grounds” of law—then the Social Fact Thesis seems false. Shapiro and Leiter, among others, fail to avert this difference. They fail to heed Hart’s distinction between external and

¹²⁴ Would this mean that some version or formulation of legal positivism is true, indeed trivially true? Not necessarily. We should distinguish between two claims: (a) the claim that whether or not the facts that need to be in place for there to be a legal system in some community *actually are in place* is purely a matter of historical fact; and (b) the claim that those facts are *themselves* purely social facts. The former claim is trivially true; but the latter—to which positivists would subscribe—is not: critics of positivism could hold that the relevant facts—the facts that need to be in place for there to be a legal system in a community—cannot be understood or described in purely non-normative or non-evaluative terms. For suggestions that Hart’s positivism, or legal positivism more generally, either can or should be understood or at least reconstructed as an external, sociological view, see Simmonds (1979: esp. 364-368); Greenawalt (1987: 39-46); Alexy (2002/1992: 27-35); Toh (2008: 451-456, but see also 482-486); Greenawalt (2009: 158).

internal statements. They think that positivists should be able to defend the “internal” version of the Social Fact Thesis. They are wrong about that. It is no surprise then that they take Dworkin’s argument from disagreement as an objection, and a forceful one at that.

3. The Justificatory View

To conclude, I want to discuss a hybrid view—a view purporting to combine positivistic and non-positivistic elements—that has recently been put forth as an attempt to account for both interpretive theoretical disagreements *and* massive decisional agreements in modern legal systems: Stefan Sciaraffa’s “Justificatory View.”

We should differentiate, Sciaraffa says, between Hart’s *positivistic theory of a legal system* and his *positivistic theory of legal content*.¹²⁵ A theory of a legal system is an account of the “existence conditions” of a legal system.¹²⁶ Hart’s theory of a legal system was a positivistic theory, Sciaraffa says, because Hart held that “a legal system exists only if its officials converge sufficiently in the criteria of validity that they accept.”¹²⁷ By contrast, a theory of legal content “is an account of what determines the norms that count as valid law in a legal system”; it is an account of “the foundational determinants of law.”¹²⁸ Hart’s theory of legal content, Sciaraffa says, was also a positivistic theory: he held the view that the “the foundational determinants of law in all legal systems” are social facts.¹²⁹

This distinction is supposed to help us to address Dworkin’s objection from theoretical disagreements. Sciaraffa thinks that a “plausible response” to Dworkin is to “abandon the positivistic theory of legal content while remaining faithful to the Hartian theory of a legal system.”¹³⁰ And interestingly, Sciaraffa’s “response” to Dworkin is Dworkinian through and through.

Like Dworkin, Sciaraffa looks at cases in which judges disagree “with respect to theories of interpretation.”¹³¹ In such cases, even though judges may all agree on how to identify the relevant valid sources—the valid statutory texts—they disagree over how those valid texts

¹²⁵ Sciaraffa (2012: 167).

¹²⁶ Sciaraffa (2012: 170).

¹²⁷ Sciaraffa (2012: 171).

¹²⁸ Sciaraffa (2012: 170).

¹²⁹ Sciaraffa (2012: 170).

¹³⁰ Sciaraffa (2012: 167).

¹³¹ Sciaraffa (2012: 174).

ought to be interpreted. As a consequence, says Sciaraffa, they disagree on what the law actually *is* on the relevant matter. That is because the “source-identifying criteria of legal validity” that enable judges to identify the relevant valid statutes “do not fully determine the legal content, the laws, of a legal system.” Rather, the legal content of any particular text “will differ depending on which interpretive approach one takes.”¹³²

Interpretive disagreements of this sort are quite common, Sciaraffa says:

[I]nterpretive approaches often remain unsettled. For example, intentionalist originalism, plain-meaning originalism and an analogue of the living tree approach each have a formidable contingent of defenders in American courts and legal scholars.¹³³

And he thinks that theorists who adopt a *positivistic theory of legal content* cannot make sense of this phenomenon. After all, these theorists hold that “what fixes a legal system’s theory of interpretation” is a *convergent* interpretive practice. “[O]n this view,” then, “insofar as there is no convergent interpretive practice, there is no way to fix the theory of interpretation that couples with the legal system’s” source-identifying criteria “to determine fully” what the law is.¹³⁴ However, judges who disagree over interpretive matters typically “assume a rhetorical stance of discerning rather than constructing the law in those cases;” and Sciaraffa like Dworkin is rightly wary of debunking strategies, like the one discussed above in Section 2, that insist that these judges are either confused or hypocrites.¹³⁵

How then should we account for such disagreements? We should recognize that “fixing the proper interpretive approach ... does not turn on the convergence of an interpretive practice amongst legal officials;”¹³⁶ we should abandon a positivist account of legal content. Instead, we should adopt the justificatory view, which holds that “the proper interpretive approach is determined by political and moral considerations.”¹³⁷

¹³² Sciaraffa (2012: 176).

¹³³ Sciaraffa (2012: 177-178).

¹³⁴ Sciaraffa (2012: 177).

¹³⁵ Sciaraffa (2012: 181).

¹³⁶ Sciaraffa (2012: 184).

¹³⁷ Sciaraffa (2012: 184): in “the constitutional-democratic context”, for example, the “proper interpretive approach” according to the justificatory view “is the one implied by the best or correct account ... of the underlying value of the constitutional-democratic rule of recognition.”

Thus far, as Sciaraffa remarks,¹³⁸ he and Dworkin are on the same page. What is the difference between their views? The difference, says Sciaraffa, is that unlike Dworkin's theory, the justificatory view is capable of "explaining massive decisional agreement among [a] legal system's officials."¹³⁹ That is because the justificatory view, although it rejects a positivistic theory of legal content, does not reject a positivistic theory of a legal system. Indeed, the justificatory view "accepts and rests upon" what Sciaraffa takes to be "the Hartian [positivistic] theory of a legal system":

The justificatory view agrees that a legal system exists only if there is sufficient convergence among its officials with respect to the rule of recognition. However, the justificatory view emphasizes that this convergence need not be full convergence. Rather, it need only be sufficient to sustain the massive decisional convergence characteristic of a system of rules rather than a cacophony of conflicting directives. That is compatible with a great deal of disagreement about the proper theory of interpretation to apply to legal sources, and even some disagreement at the margins with respect to source-identifying elements of the rule of recognition, so long as the decisions from these somewhat varying perspectives about the system's rule of recognition generally overlap.¹⁴⁰

But Sciaraffa's justificatory view is problematic. Notice first that although the non-positivistic element of the justificatory view is supposed to be a non-positivistic theory of legal content, Sciaraffa's argument seems to warrant only a non-positivistic theory of *one aspect* of legal content. Namely, it seems to warrant only a non-positivistic theory of "what fixes a legal system's theory of interpretation."¹⁴¹

Yet legal content is also a matter of what the valid sources are. Sciaraffa may be right to point out that "source-identifying criteria of legal validity ... do not *fully* determine legal content;" but surely they do *partly* determine legal content. So does the justificatory view call for a non-positivistic theory of source-identifying criteria of legal validity? This is unclear. One reason to think it does not, though, is that the justificatory view is meant to be committed to what Sciaraffa sees as Hart's positivist theory of a legal system, and this theory as Sciaraffa presents it seems to include a claim precisely about the criteria of legal validity. Here is Sciaraffa's own statement of the "account of the existence conditions of a legal system," which the justificatory view is supposed to accept (and which he takes to be Hart's):

¹³⁸ Sciaraffa (2012: 184).

¹³⁹ Sciaraffa (2012: 186).

¹⁴⁰ Sciaraffa (2012: 187-188).

¹⁴¹ Sciaraffa (2012: 177).

[A] legal system exists only if (1) its officials converge in accepting from the internal point of view more or less the same criteria of legal validity (as well as the system's related rules of change and rule of adjudication), and (2) the system's citizens generally comply with the norms that the system's officials recognize and apply as law.¹⁴²

Now if the justificatory view adopts a positivist theory of source-identifying criteria of legal validity, then by Sciaraffa's own lights the justificatory view is committed to something like the "social fact" thesis of source-identifying criteria of legal validity. That means that the justificatory view is unable to account for theoretical disagreements among judges regarding what the source-identifying criteria of legal validity actually are. In fact—whether or not the justificatory view is formally committed to a positivistic account of source-identifying criteria of legal validity—Sciaraffa explicitly says, as we saw, that regarding "the source-identifying elements of the rule of recognition," the justificatory view tolerates only "some disagreement at the margins."¹⁴³ But then the justificatory view does fall prey after all to Dworkin's objection from theoretical disagreement. Sciaraffa writes as if Dworkin's objection applies only to theories of interpretation.¹⁴⁴ But that of course is not true. As the discussion in the previous sections shows—and as clearly emerges from the variety of cases Dworkin uses to illustrate his point—Dworkin's objection concerns theoretical disagreements about what the valid sources are *as well as* theoretical disagreements about how the valid sources ought to be interpreted.¹⁴⁵ Given that Sciaraffa agrees that Dworkin's objection from theoretical disagreement is sound, it follows that his own justificatory view is wrong.

What could Sciaraffa reply? That as a matter of fact source-identifying disagreements are not as common as interpretative disagreements? That in any viable legal system disagreement about the sources occurs only "at the margins"? But as we saw in Section 2, this reply is a non-starter for anyone who thinks that Dworkin's objection from theoretical disagreements does constitute a forceful challenge to social fact theories. Unless, of course, Sciaraffa insists that the justificatory view is serious about being a non-positivistic theory of legal *content* and is accordingly committed to a non-positivistic theory of source-identifying criteria. But then

¹⁴² Sciaraffa (2012: 169).

¹⁴³ See the quotation accompanying n. 140 above.

¹⁴⁴ "The specific disagreement that Dworkin and others have raised," he says, "is with respect to theories of interpretation": see Sciaraffa (2012: 174).

¹⁴⁵ This point is helpfully highlighted in Smith (2010: 641).

why should the justificatory view insist on widespread convergence with regard to such criteria? For a non-positivistic theory of legal content, after all, that there actually *is* widespread agreement among officials is a contingent matter; it is not something that a non-positivist theory of legal content sets out to “explain.”

These worries are symptomatic of a deeper problem, which is that Sciaraffa too is insufficiently alert to the distinction between the internal statements of law made from the perspective of a participant, and external statements about law made from the perspective of an observer. The following passage, on an example given by Hart in *The Concept of Law*, is revealing:

Consider a case in which two groups of legal officials fully converge in their understanding of every detail of their system’s criteria of legal validity save for one difference. One group holds that legislative enactments are law, including entrenched provisions of such enactments that impose supermajority requirements on future legislatures who might seek to amend or strike the entrenched enactment, whereas a second group holds that legislative enactments generally are law but that any provision putatively entrenching such a law is not legally valid. Thus, these two groups disagree about the legal validity of provisions that purport to entrench a law. What should we say about the legal status of such provisions in the legal system? Are they valid or not?¹⁴⁶

But this is the wrong question to ask. Whether the entrenched provisions *are* valid law is an internal question—a question about what actually *is* valid law in that system. Any answer to that question will therefore take the form of an internal statement of law, and will commit us to side with one of the two groups of officials. Sciaraffa says that “the Hartian answer to this question is not obvious.”¹⁴⁷ I think, on the contrary, that it *is* obvious that Hart was not at all concerned with questions of this sort to begin with. It is also obvious what Hart would say about the example. He would simply say that *the officials are divided on this point*, even though they converge on all other issues concerning their system’s criteria of legal validity; and this of course is an external statement about *what the officials think about the validity of entrenched provisions*, not an internal statement *that* entrenched provisions are (or are not) valid. Hart would also say that if this is the sole extent of official disagreement, then such a community would certainly still have a legal system. In fact, that is what Hart *does* say about examples of this kind:

¹⁴⁶ Sciaraffa (2012: 171-172).

¹⁴⁷ Sciaraffa (2012: 172).

The normal conditions of official, and especially of judicial, harmony, under which alone it is possible to identify the system's rule of recognition, would have been suspended. Yet the great mass of legal operations not touching on this constitutional issue would go on as before. Till the population became divided and "law and order" broke down it would be misleading to say that the original legal system had ceased to exist: for the expression "the same legal system" is too broad and elastic to permit unified official consensus on all the original criteria of legal validity to be a necessary condition of the legal system remaining "the same." All we could do would be to describe the situation as we have done and note it as a substandard, abnormal case containing within it the threat that the legal system will dissolve.¹⁴⁸

And this—that in this legal system there is quite simply *no unified consensus* on all of the criteria of legal validity—does seem to be the natural thing for Hart to say. The reason is that it seems plausible to think that from an observer's perspective, a statement that some given community has law—that is, an external statement that *there is* a legal system in a given community—would still be true even in the absence of such a unified consensus, provided that there were a substantial degree of convergence.

This will only be surprising for someone who mistakes Hart's view on what makes such an external statement about the "existence" of a legal system true, for a view on what actually makes a particular internal statement of legal validity—for example a statement of the form "x is a valid law" or "y is a validly enacted statute"—true or correct. And Sciaraffa seems to me to make this mistake. Like Dworkin, he seems to think that Hart was of the view that, for any particular internal statement *S* of the form "x is a valid law," *S* is true or correct relative to some legal system if and only if the officials in this system converge in accepting that *S* is true or correct.¹⁴⁹

I have suggested in the previous sections that this could not have been Hart's view. More importantly, however, I suggested that such a view is actually wrong. It is true, as I noted, that many contemporary theorists *have* sought to articulate "social fact" theories of what Sciaraffa calls the "foundational determinants" and Dworkin calls the "grounds" of internal statements of law. Sciaraffa, following Dworkin's lead, does move one step in the right direction. He agrees that "social fact" accounts of what he calls "legal content" must fail. But he should recognize that the relevant contrast to draw is not between positivistic accounts of the existence of a legal system and non-positivistic accounts of legal content. The relevant

¹⁴⁸ Hart (2012/1961: 122-123).

¹⁴⁹ See Sciaraffa (2012: 172).

contrast to draw is between two perspectives (and two corresponding kinds of theories): the external and the internal perspectives of law.

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