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HART'S EXPRESSIVISM AND HIS BENTHAMITE PROJECT*

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I.

In a 1973 article, H.L.A. Hart says the following about Jeremy Bentham's achievements in the philosophy of law:

> Bentham was certainly not the first to define law as a command: Hobbes, for example, had anticipated him in that, and even the despised Blackstone's definition of municipal law was in terms of command. But Bentham differed from Hobbes and, as far as I know, from all previous social theorists in insisting that we must not so define our terms in legal or political theory as to make the practical conclusions which we favour follow from them. Such definitions have been aptly called 'persuasive definitions' and among Bentham's many claims to be an innovator none is better founded nor, I think, more important than his insistence on a precise and so far as possible a morally neutral vocabulary for use in the discussion of law and politics. This insistence, though it may seem a merely linguistic matter, was the very centre, and I would say the sane and healthy centre, of the legal positivism of which Bentham may be regarded as the founder. It accounts for many important themes in his general theory including the form of his own definition of law. The terms that Bentham uses to define law are all flatly descriptive and normatively neutral. (1973, 28)

In the early chapters of *The Concept of Law* (1961/1994), Hart marshaled what many see as devastating criticisms of Bentham's command theory of

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law.[1] But he did not object to Bentham's commitment to uses only of "flatly descriptive and normatively neutral" vocabulary in characterizing law. And in developing his own alternative legal theory, Hart remained true to "the sane and healthy centre" of the English Enlightenment in jurisprudence that Bentham ushered in.

Hart famously drew a distinction between internal and external legal statements (1961/1994, vi, 89, 102–103). *Internal* legal statements are statements *of* law. They are normative statements made from the point of view of an adherent of a legal system. *External* legal statements, on the other hand, are statements *about* individual laws or legal systems. They are descriptive statements made from the point of view of an observer.

The most important of the external legal statements are those that attribute a law or a legal system to a community of people. In providing analyses of such statements, Hart provided naturalistic descriptions of what it takes for a law or a legal system to exist or prevail in a community. Roughly, Hart conceived of a legal system as a set of norms that constitute a pyramid-like structure, with what he called the "rule of recognition"—a norm that specifies the criteria of validity for other norms of the system—at the very top. A legal system exists in a community if some subset of the members of that community—call them "officials"—accept the rule of recognition, and the nonofficial members at least comply with the norms that are valid according to the rule of recognition (1961/1994, 116, 201–202). A law prevails in a community if a norm with the content of that law is valid according to the rule of recognition of the prevailing legal system. Thus Hart depicted the existence of a particular kind of norms and of a particular kind of normative systems in flatly descriptive and normatively neutral vocabulary.

Given that the practice of law is a discursive practice, one large and important aspect of understanding legal goings-on is to obtain an understanding of what lawyers and others are up to in uttering internal legal statements. Here, Hart did not straightforwardly analyze internal legal statements themselves. Instead, he provided an analysis of theoretical statements that attribute internal legal statements to speakers. With some rational reconstruction, what could be called Hart's "oblique" analysis[2] of internal legal statements can be characterized as follows: in uttering an internal

1. Strictly speaking, Hart's criticisms in *The Concept of Law* was against a command theory that is modeled on John Austin's simple and derivative theory that was a popularized version of Bentham's own theory. Hart's consideration of Bentham's more sophisticated command theory is contained in the articles collected in *Essays on Bentham* (1982a). The details of Bentham's theory was generally unavailable until his *Of Laws in General* was discovered among his papers and published in 1945. In his article on this work, Hart says the following about *Of Laws in General*: "[H]ad it been published in his lifetime, it, rather than John Austin's later and obviously derivative work, would have dominated English jurisprudence, and . . . analytical jurisprudence, not only in England, would have advanced far more rapidly and branched out in more fertile ways than it has since Bentham's days" (1971/1982, 108). Hart's edited version of *Of Laws in General* was published as a volume in *The Collected Works of Jeremy Bentham* in 1970.

2. For a fuller description of what kind of analysis Hart is providing, *see* the last two paragraphs of Section II.

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legal statement, a speaker expresses his acceptance of norms that make up the legal system. What Hart offers then is an expressivist or noncognitivist analysis of internal legal statements.[3]

Even philosophers familiar with *The Concept of Law* have not realized that Hart espouses an expressivist or noncognitivist analysis of internal legal statements. All too often, philosophers have confused Hart's expressivist analysis of internal legal statements with his descriptivist analysis of external legal statements, and as a consequence have attributed to Hart a descriptivist analysis of internal legal statements. More important, many philosophers have failed to see how Hart's analysis of internal legal statements fits into his larger Benthamite project of devising a "flatly descriptive and normatively neutral" depiction of the practice of law, including its discursive aspect. As a result, some of the leading critics of Hart have summarized Hart's existence-conditions for laws and have gone on to complain that such a description fails to show why people have *reasons* or even *duties* to act according to laws (see Dworkin 1972, 50–51; Raz 1975/1990, sec. 2.1; *cf.* Smith 1994, 206 n. 2). The appropriate response to this criticism is that Hart never meant to offer such a *justification* of people's adherence to laws. But those who see themselves as defending Hart (or a position like Hart's) have tried to argue that Hart's existence-conditions (or some variations thereof) do actually justify people's adherence to laws (*see, e.g.,* Postema 1982; Coleman & Leiter 1996; Coleman 2001a, lecture 7; Shapiro 2002).[4]

The resulting unfortunate state of affairs is that the Benthamite project of devising a normatively neutral characterization of the practice of law has once again become a neglected option in legal philosophy. The misunderstanding of Hart's analysis of internal legal statements is symptomatic of and also reinforces the widespread failure to grasp his larger Benthamite project. In this paper, I would like to take a step toward resuscitating that project by offering an expressivist or noncognitivist analysis as a rational reconstruction of Hart's analysis of internal legal statements in *The Concept of Law*.

3. I owe special gratitude to John Devlin for first suggesting to me that the Hart of *The Concept of Law* may have been a noncognitivist and even a norm-expressivist. Only subsequently did I encounter Joseph Raz's writings classifying Hart as a noncognitivist. *See* Raz 1981; 1993. I am also particularly indebted to David Hills, who led me to see that the case for attributing expressivism to Hart is not as easy as it may first appear.

4. The hankering for a theory of a normative practice that offers not only an adequate explanation of participants' motives but also their justification is not unique to the philosophy of law. In the first of her Tanner Lectures, Christine Korsgaard says that an adequate "theory of moral concepts" has not only what she calls "explanatory adequacy" but also a "normative or justificatory adequacy." *See* Korsgaard 1996, 12–13. Korsgaard attempts to offer such a theory in the rest of her lectures; and she has elsewhere criticized other theories, including expressivist ones, for failing to provide the second adequacy (*see, e.g.,* Korsgaard 2003, esp. 122 n. 49). And Warren Quinn's often-celebrated argument that dispositional functional mental states cannot "rationalize" the actions that they motivate is based on the assumption that a metaethical theory must provide normative or justificatory adequacy in addition to explanatory adequacy. *See* Quinn 1993.

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I will first argue for the attribution of an expressivist or noncognitivist analysis to the Hart of *The Concept of Law* (Sections II–V). I shall then furnish textual and historical evidence, taken from both Hart's writings before and after the publication of *The Concept of Law* and the writings of some of his predecessors and contemporaries, to buttress further my case for Hart's expressivism (Sections VI–X). Finally, I will consider Ronald Dworkin's influential criticism of Hart's conception of internal legal statements, according to which Hart cannot account for some genuine legal disagreements. I shall argue that Dworkin's criticism is founded on a mischaracterization of Hart's analysis as a descriptivist analysis of the sort that both G.E. Moore and the early emotivists criticized and that in his expressivist or noncognitivist analysis Hart had an account of internal legal statements that was designed to explain normative disagreements (Sections XI–XV).

I do not by any means think that Hart has the last word on the issue of the nature of the legal discourse. But my belief is that his writings should be the starting point for a renewed investigation of this important issue, for neither Dworkin nor any other legal philosopher has furnished us with sufficient reasons for starting elsewhere (or veering soon after the start).[5]

II.

Before attributing an expressivist or noncognitivist analysis of internal legal statements to Hart, I will briefly explain in this section what expressivism and noncognitivism are. Although many treat these terms as synonymous, strictly speaking they have different meanings.[6]

"Expressivism" is a label coined by Allan Gibbard to refer to a group of theories that seek to explain the meanings of normative and, in particular, ethical terms with a particular strategy. Instead of defining a term, an expressivist analysis tells us what mental state a speaker expresses by uttering a statement containing that particular term (Gibbard 1986, 473; 1990, 8). Expressing a state of mind is different from reporting one's state of mind. In making a factual statement, for instance, a speaker expresses his belief in some state of affairs but he does not report that he has that belief (Russell 1944, 721–722; Stevenson 1963b, 205; Gibbard 1986, 473; 1990, 84–85).[7]

5. I have elsewhere proposed an analysis of internal legal statements that is meant to offer improvements on Hart's analysis, but one that is very much Hartian in its spirit. *See* Toh 2005.

6. I should point out here that I am attributing to Hart only the versions of expressivism and noncognitivism that I will be outlining in this section. Hart and Raz, whose characterizations of Hart's position will serve as some of the evidence I will rely on, use the terms "noncognitive" and "expressive" to characterize a number of philosophical positions that one or both attribute to Hart. *See* Hart 1958a, 58 n. 25, 82–84; 1961/1994, 302; 1966/1982, 157, 159–160; 1982b, 266–267; Raz 1981, 448–449; 1993, 148. But only some of these views overlap with my versions of expressivism and noncognitivism.

7. Unless the factual statement is about his state of mind.

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An expressivist out to explain a normative term can combine his expressivism with noncognitivism. In uttering a statement containing a normative term, according to an expressivist who is also a noncognitivist, a speaker expresses a *conative* or *noncognitive* mental state (e.g., a desire) rather than a *cognitive* one (e.g., a belief) (*see* Stevenson 1962, 80; 1963b, 208; Smith 1994, 10). I shall henceforth generally use the term "expressivism" to refer to this strategy that combines expressivism and noncognitivism to explain the meaning of statements containing normative terms.

Three considerations together motivate expressivist analyses of normative statements.[8] First, expressivists are struck by the fact that, at least for some normative concepts, the content of an assessment using one of those concepts implies, or the act of making the assessment requires, that any agent within the scope of that assessment—which can include the agent making the assessment—possesses a reason or motive to act according to the assessment (*see* Falk 1947–1948; Railton 1989, 151, 171; 1993, 284, 298 n. 4).[9] Take "good," for example. A person's assessment of some state of affairs as good implies that he has a reason or motive to promote that state of affairs.

Expressivists see this noncontingent connection between normative assessments on the one hand and existence of reasons or motives on the other as eliminating from contention naturalistic definitions of normative terms. We may initially be tempted to think that in making a normative statement, a speaker describes some state of affairs in the world, and that a normative term employed by the speaker denotes a property. But if that were the case, the thought goes, then the property denoted by the normative

8. I will be outlining the three considerations—(1) internalism and consequent rejection of analytic naturalism; (2) commitment to philosophical naturalism and consequent rejection of intuitionism; and (3) assumption of well-foundedness and consequent rejection of error theories—that have been traditionally held by expressivists as providing jointly compelling grounds for opting for expressivism. I am not here endorsing their view. At each juncture of my outline, one could take issue with expressivists' reasoning and decline to take the step that eventually leads to expressivism.

9. This is the consideration that philosophers often call "internalism". Many related but different theses that philosophers mean by this term have been distinguished and catalogued by William Frankena (1958) and Stephen Darwall (1983, ch. 5; 1996). In my formulation of internalism in the above text, however, I have intentionally retained the ambiguities found in the writings of earlier authors such as W.D. Falk (1947–1948). I have done this not only because Hart wrote at a time when the different theses were not clearly distinguished, but also because the ambiguities reflect our less-than-clear conception of the phenomenon of normativity that needs to be explained and also the different theoretical options we can pursue in explaining the phenomenon. One conjecture that I have but cannot develop here is that the phenomenon of normativity we want to explain by various theses of internalism has what Hart would call "internal" and "external" aspects. (The *internal* and *external* aspects that I want to talk about here are, as far as I can tell, unrelated to the terms "internalism" and "externalism" that are used to explain the phenomenon of normativity.) From the internal or agent's point of view, what we want to explain is existence internalism regarding reasons; whereas from the external or observer's point of view, what we want to explain is judgment internalism regarding motives. Expressivists are chiefly interested in the latter explanation and are interested in the former only to the extent of showing that their explanation of normative discourse does not debunk the existing practice.

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term cannot be a natural property—that is, a property of the sort that figures in our explanations in natural and social sciences. For neither the instantiation nor the acknowledgment of the instantiation of any natural properties has the above-described noncontingent connection to reasons or motives. It follows that normative terms cannot be defined purely in natural terms that denote natural properties.

It was G.E. Moore who initially led expressivists to see that normative terms are not definable in purely natural terms (see Moore 1903/1993, chs. 1–2). Expressivists agree with Moore that no natural property has a noncontingent connection to reasons or motives and hence that normative terms cannot be defined in purely natural terms. But they decline to follow Moore in drawing the additional conclusion that normative terms must therefore denote nonnatural normative properties. Here expressivists are motivated by a second consideration—namely, their desire for and belief in the possibility of maintaining a congruence between the commitments of our normative thoughts and discourses on the one hand and our going view of the world on the other.[10] Expressivists are partisans of a philosophical outlook that is much more empiricist, naturalistic, and antimetaphysical than Moore's. They are loath to countenance properties that do not figure in our explanations in natural and social sciences. And they have special misgivings about positing properties that have noncontingent sway over our wills and our epistemic and semantic accesses to which properties cannot be satisfactorily explained. Instead of adopting Moore's view that our normative terms refer to such normative properties, expressivists claim that normative terms do not refer at all.

At this point, someone aiming to give an analysis of normative terms has two options. He can say either that the normative terms we use purport to denote properties but fail to,[11] or that the normative terms do not even purport to denote any properties. Here we encounter the third consideration that motivates expressivists. In attempting to give an explanation of our normative discourses, expressivists begin with the assumption that our discourses are in good standing, that they are not fundamentally flawed. For this reason, expressivists take the second of the two options above and claim that our normative terms do not purport to refer to any properties. The role and purport of our normative statements are entirely different from those of our descriptive, property-attributing statements. We resort to normative statements, expressivists maintain, in order to express conative mental states.

The earliest significant form of expressivism was the emotivism of A.J. Ayer and C.L. Stevenson. According to Ayer and Stevenson, in uttering ethical statements, we express our emotions or attitudes (Ayer 1935/1946; 1949;

10. I am borrowing the terms "congruence" and "going view of the world" from Darwall et al. 1992, 126.

11. This first option was of course pursued by J.L. Mackie 1977.

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Stevenson 1937; 1944). R.M. Hare argues that in uttering ethical statements, we express universal, overriding preferences (1952; 1963; 1981). Gibbard claims that in uttering statements of rationality, we express our acceptances of systems of norms (1986; 1990).

In proposing such explanations of what we are up to in uttering normative statements, expressivists are not defining the relevant normative terms, if by "defining" one means the activity of explaining the meanings of terms by providing synonymous expressions. They are hence not offering analyses as traditionally conceived. Instead, they are offering analyses of theoretical second-order statements that attribute to speakers first-order statements containing the relevant normative terms. And in thus explaining what we are up to in using various normative terms, they are—from the sidelines, so to speak—explaining the meanings of the relevant normative terms. For this reason, what they offer can be considered a sort of analysis—not a *straight* analysis but rather an *oblique* or *sideways* analysis.[12]

In formulating such an oblique or sideways analysis of normative statements, an expressivist resorts only to naturalistic terms and does not employ any normative terms. Thus he offers a nondebunking characterization of discursive normative practices that is congruent with what he considers the going view of the world.

III.

There is much evidence in *The Concept of Law* to support an attribution to Hart of an expressivist analysis of internal legal statements. To begin, we can observe that Hart was motivated by at least two of the three above-discussed considerations that motivate expressivist analyses.

Near the very beginning of *The Concept of Law*, Hart draws a distinction between mere convergence of behavior and existence of a rule. He notes that in characterizing the latter case, but not the former, we employ normative vocabulary (1961/1994, 10). Speaking more specifically of the existence of legal rules, Hart discusses the so-called prediction theory of law, most commonly associated with Oliver Wendell Holmes and his American legal realist followers but traceable ultimately to Bentham and John Austin.[13] According to this theory, roughly, a legal statement to the effect that the law requires a person to ϕ means that the person probably will be punished if he does not ϕ. Hart rejects the prediction theory, reasoning as follows:

12. Allan Gibbard distinguishes between "straight" and "oblique" analyses in Gibbard 2003, 185. But the idea behind the distinction is of an older vintage and can be found in the thought that one way of giving an analysis of a word is to describe its typical uses. *See* Waismann 1956, 6; 1965/1997, 156–158; Hart 1963, 288; Hare 1968, 437–438; Gibbard 1990, 30–31.

13. *See, generally,* Hart 1966/1982, where he describes Bentham's legal theory as a "mixed theory" consisting of "imperative and probabilistic elements" (134).

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> To such a predictive account there are many objections, but one in particular . . . deserves careful consideration. It is that if we look closely at the activity of the judge or official who punishes deviations from legal rules (or those private persons who reprove or criticize deviations from non-legal rules), we see that rules are involved in this activity in a way which this predictive account leaves quite unexplained. For the judge, in punishing, takes the rule as his *guide* and the breach of the rule as his *reason* and *justification* for punishing the offender. (1961/1994, 10–11)

Here Hart is appealing to nothing other than the noncontingent connection between a normative assessment, on the one hand, and the assessing person's possession of reason or motive, on the other, to reject the prediction theory.[14]

Much caution is required in determining what Hart in this passage takes to be the relata between which a noncontingent connection is supposed to hold. Hart is *not* saying that there is a noncontingent connection between the existence of a law, on the one hand, and the existence of a reason or justification to punish the offender, on the other. Instead, he is saying that there is such a connection between a judge's judgment that a law exists, on the one hand, and his *taking* or *considering* the law as providing him with a reason or justification for punishing the offender, on the other. If the former interpretation were correct, then my complaint at the beginning of this paper that many philosophers have misinterpreted Hart's legal theory would be off the mark, and these philosophers would be right in thinking that Hart aimed to provide a characterization of legal practice that provides reasons for people's compliance with laws. But that is not the case, and the second of the two interpretations is more accurate.

I must admit, however, that Hart was not always very careful in specifying the relata, and there are a number of passages in *The Concept of Law* that call for the first interpretation. No doubt such passages have misled many philosophers in the way that I have indicated at the beginning of this paper. For example, at one point, Hart discusses the analysis of internal legal statements as commands backed by threats of sanctions, a view also proposed by Bentham and Austin, and says:

14. Of course, a prediction that sanctions will be imposed if citizens act in a deviant way will usually convince ordinary citizens that they have a reason to act in an alternative way. But, as Hart points out in the passage quoted above, the prediction theory does not explain why *judges* see themselves as having reasons to impose sanctions. Moreover, perhaps more important, the connection established by the prediction theory between probability of sanctions, on the one hand, and reasons or motives, on the other, is merely a contingent one. A law may exist even when the probability of sanctions upon noncompliance is negligible or nil. Yet at least some members of a community—those who take what Hart calls the "internal point of view" to the laws of their community (1961/1994, 89)—take the mere existence of a law as providing them with reasons for compliance. In sum, Hart's opinion is that the prediction theory provides a phenomenologically inaccurate characterization of how people consider laws.

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> [T]he theory of law as coercive orders, notwithstanding its errors, started from the perfectly correct appreciation of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory. In choosing this starting-point the theory was well inspired. (1961/1994, 82)

If Hart were more careful, he would have said that the said theory started from the correct appreciation of the fact that where a person makes a judgment that a law exists, he considers some action nonoptional or obligatory. My reading is borne out by Hart's discussion of Hobbes's and Bentham's differing command theories in the same 1973 article that I quoted at the beginning of this paper. Hart there observes:

> [W]hereas Hobbes had treated the commands of the Sovereign that make law as issued to those who are under an obligation to obey him, Bentham will have nothing of this antecedent obligation or the social contract alleged to generate it, and defines the Sovereign merely in the flat terms of habits of obedience. Hence . . . nothing follows from the statement that laws so defined exist as to any moral reason for obedience: that vital issue, Bentham thought, must await the judgement of utility on the content of the laws. (1973, 28)[15]

Though Hart is less careful than one would wish, he is clearly motivated by a version of the first of the three considerations that motivate expressivists.

Hart also gives voice to a temptation to accept some form of nonnaturalism akin to Moore's to account for the noncontingent connection. He points out that critics of the prediction theory may concede that there is "something obscure" in the existence of a rule—"something which resists analysis in clear, hard, factual terms" (1961/1994, 11). Hart continues:

> What *can* there be in a rule apart from regular and hence predictable punishment or reproof of those who deviate from the usual pattern of conduct, which distinguishes it from a mere group habit? Can there really be something over and above these clear ascertainable facts, some extra element, which guides the judge and justifies or gives him a reason for punishing? (11)

Hart says that we may be tempted to "imagine that there is something external, some invisible part of the fabric of the universe guiding and controlling us in these activities" (11–12).[16]

15. In reaction to Hobbes, Locke argued that an obligation cannot arise merely from the commanding person's power to compel and the commanded person's desire for self-preservation. For this reason, Locke argued that only a person with an *authority* or *right* to command can create an obligation. *See* Schneewind 1994, 213–214. Whereas Locke offered a different conception of obligation in reaction to Hobbes, Bentham, as Hart describes him, abstained from the talk of obligations altogether.

16. Mackie is usually given the credit for coming up with a particularly piquant formulation of a central metaethical question, a formulation that nicely sums up the misgivings many have about the nonnaturalism of the sort that Moore espouses, by asking "whether values are or are not part of the fabric of the world" (1977, 15). It seems that Hart's use of an almost identical

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Hart himself resists this temptation. And his resistance is motivated by a desire to have an account of the legal discourse that is congruent with the naturalistic conception of the world that he shares with other expressivists. Hart characterizes the classical theories of natural law as having in common the view that certain principles of human conduct are in some sense embedded in nature, as teleologically conceived, and these principles await discovery by human reason (186–191).[17] He notes: "This outlook is, in many ways, antithetic to the general conception of nature which constitutes the framework of modern secular thought" (1961/1994, 186; *cf.* 1967, 111).[18]

In sum, for the reasons that motivate other expressivists, Hart rejects what are two of the leading types of legal theories: the classical natural law theories, and Bentham and Austin's prediction theory of law. We can then expect from Hart an analysis of internal legal statements that is motivated by the two considerations that I have discussed, and thus avoids the errors of the theories of the two leading kinds. Commenting on the prediction theory of law, Hart says that to many legal theorists, the analysis of statements of obligation as "predictions or assessments of chances of incurring punishment or 'evil'":

> has appeared as a revelation, bringing down to earth an elusive notion and restating it in the same clear, hard, empirical terms as are used in science. It

phrase preceded Mackie's use by some eighteen years. Hart first used the phrase in a 1959 review article. *See* Hart 1959, 163.

17. My exposition is made awkward by the fact that the classical natural law theories are a form of what Moore calls and, following him, I call nonnaturalism. The awkwardness, of course, stems from different conceptions of nature that are espoused by the proponents of classical natural law theories, on the one hand, and the more recent philosophical writers, on the other. I hope that which of the two senses of "natural" is in play at any one juncture in my exposition is made plain by the context of the term's occurrence.

18. Here Hart may be seen as following his legal positivist predecessors. Holmes warns us against treating law as a "brooding omnipresence in the sky." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Hans Kelsen, in an article titled "The Natural-Law Doctrine before the Tribunal of Science," faults various natural law theories for making "the metaphysical assumption of the immanence of value in natural reality [that] is not acceptable from the point of view of science" (1949, 141). And according to Alf Ross, the core of legal positivism is an adherence to an "empiricistic, antimetaphysical philosophy" (1961, 48). It should be noted that for legal positivists like Hart, the rejection of the nonnaturalism of the classical natural law theorists is motivated not only by their theoretical interest in showing a congruence between the commitments of our legal discourse and our going view of the world, but also by a practical aim of facilitating political and legal reforms. In an article on Bentham, Hart says the following:

> [Bentham thought] that human society and its legal structure which had worked so much human misery, had been protected from criticism by myths, mysteries, and illusions, not all of them intentionally generated, yet all of them profitable to interested parties. . . . For [Bentham] such mystery was made possible by the failure on the part of ordinary men to realize that the forms of law and human society were at bottom merely human artefacts, not natural necessities but things actually made by men, and hence things which could be unmade and remade (1973, 25–26).

Thus motivated is Bentham's goal, which Hart came to share, of providing a "flatly descriptive and normatively neutral" characterization of the legal practice.

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> has, indeed, been accepted sometimes as the only alternative to metaphysical conceptions of obligation or duty as invisible objects mysteriously existing 'above' or 'behind' the world of ordinary, observable facts. But there are many reasons for rejecting this interpretation of statements of obligation as predictions, and it is not, in fact, the only alternative to obscure metaphysics. (1961/1994, 83–84)

IV.

An expressivist analysis of internal legal statements is the third alternative Hart has in mind, and that is what he proposes in *The Concept of Law*. Almost no one has taken notice of this. Notable exceptions that I am aware of are Joseph Raz, who in a handful of places has attributed to Hart an expressivist analysis of internal legal statements (see Raz 1981; 1993; *cf.* 1998, 3–6),[19] and John Devlin, who, in a number of conversations, was the first to make me aware of the possibility that Hart was an expressivist.

Ascertaining Hart's analysis of internal legal statements is a delicate task. Nowhere in *The Concept of Law* does Hart explicitly formulate an analysis of these statements, and what he does say can be taken in a number of different ways. For these reasons, I think it would be useful to start with what Raz has said about Hart's conception of internal legal statements, and to look at Hart's own statements thereafter.

In a 1981 article comparing Hart's and Hans Kelsen's positions, Raz outlines Hart's conception of internal legal statements as follows:

> In part the meaning of legal statements can be given a truth-conditional analysis. Legal statements are true if and only if certain relations obtain between them and the complex social practices. But it would be wrong to say that legal statements are just statements about the existence of those practices. The truth-conditional analysis does not exhaust the meaning of legal statements. To understand them one must also understand their standard uses and what they express. Their typical use is to provide guidance by criticizing, commending, demanding, advising, approving, etc. and they express acceptance by the speaker of standards of behaviour towards conformity with which the statement is used to guide its addressee. (1981, 448)

Similarly, in a 1993 memorial essay on Hart, Raz summarizes Hart's account of deontic statements, of which legal statements are one species, as follows:

19. Yet his response in Raz 1998 to some of Dworkin's criticisms of Hart leads me to think that Raz may not realize the full implications of this attribution. For in that article Raz seems to think that Hart's legal theory needs to be revised or updated in light of the anti-individualistic upshot of some recent works in philosophy of language in order to properly handle Dworkin's criticism that it cannot account for genuine legal disagreements. As I will argue in the last third of this paper, Hart's expressivist analysis of internal legal statements, even without such an update, has sufficient resources to completely deflect Dworkin's criticism.

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> If Hart must be classified as one or the other, then it is better to classify him with the non-cognitivists. But he charted his own way between the two, and developed a distinctive view which combines cognitivist and non-cognitivist elements. Statements of rules, duties, and rights are true or false, but the conditions which render them true or false do not exhaust their meaning and do not account for their normative character. The truth-conditions of such statements are the existence of certain social practices. . . . A simple moral statement such as 'parents have a duty to look after their children' is true if there is (in the community to which the speaker belongs) a practice that parents have such a duty, that is, roughly speaking, if most parents do so and are consciously disposed to do so. But the statement means more than that. It also expresses its speaker's endorsement of this rule, his willingness to be guided, and to require others to be guided, by it. This second non-cognitivist component expresses the normative element in the statement. (1993, 148)

Thus Raz attributes to Hart an analysis that has a noncognitivist or expressivist prong and a cognitivist prong.[20]

In attributing this view to Hart, Raz unfortunately does not cite particular passages from Hart's writings, and I am not sure whether he had any in mind. A passage on page 108 of *The Concept of Law* seems to come nearest to what Raz may have had in mind. Hart says there that internal legal statements usually carry two *presuppositions* that together form "the normal background or context of statements of legal validity":

> First, a person who seriously asserts the validity of some given rule of law, say a particular statute, himself makes use of a rule of recognition which he accepts as appropriate for identifying the law. Secondly, it is the case that this rule of recognition, in terms of which he assesses the validity of a particular statute, is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. (1961/1994, 108)

In this passage, Hart enumerates two separate presuppositional commitments that a speaker makes in making a legal statement.[21] But this passage

20. The following passage from a 1998 article by Raz is also pertinent and reinforces the point he makes in the two passages quoted in the text: "Both Stevenson and Hare made their respective emotivist and prescriptivist accounts of moral utterances more plausible by allowing that, apart from pure assertions and pure expressions of emotions (in Stevenson's case), or prescriptions (in Hare's case), there are utterances that combine both. Hart's legal statements from an internal point of view are one such case of a hybrid statement: stating how things are under the law, while endorsing or expressing an endorsement of the law at the same time" (1998, 5). In light of this passage, Raz's failure, displayed in the same article, to see the resources Hart has in his expressivist analysis to handle Dworkin's criticism about legal disagreements is all the more surprising. Stevenson, in particular, motivated his emotivist analysis in large part by pointing to its ability to account for ethical disagreements. *See* Stevenson 1937; 1948.

21. Philosophers and linguists have catalogued different types of presuppositions. *See, e.g.,* Soames 1989; Rumfitt 1998. Given Hart's close association with P.F. Strawson, it is very likely that Hart's use of presuppositions was prompted by Strawson's works on semantic presuppositions. *See* Strawson 1950; 1952, ch. 6. Hart's discussion, however, is not fine-grained enough for us to

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alone does not warrant an expressivist characterization of either commitment. In addition to the two presuppositions, Hart seems to indicate at the beginning of the above-quoted passage, a speaker *says* or *asserts* that a particular legal norm is valid. Hart could have opted for an expressivist characterization of what a speaker says or asserts. But this is not an interpretation of Hart's position that is clearly warranted by the above passage alone.

Consideration of some other key passages in Hart's works seems to indicate that a slightly different interpretation of Hart's position is better supported. In a 1959 review article, Hart analogizes the rule of recognition of a legal system to the scoring rule of a game and says the following:

> When the scorer records a run or goal he is using an accepted, unstated rule in the recognition of critical phases of the game which count towards winning. He is not predicting his own or others' behaviour or feelings, nor making any other form of factual statement about the operation of the system. The temptation to misrepresent such internal statements in which use is made of an unstated, accepted rule or criterion of recognition as an external statement of fact predicting the regular operation of the system is due to the fact that the general acceptance of the rules and efficacy of the system is indeed the *normal context* in which such internal normative statements are made. It will *usually* be pointless to assess the validity of a rule . . . by reference to rules of recognition . . . which are not accepted by others in fact, or are not likely to be observed in future. We do, however, sometimes do this, in a semi-fictional mood, as a vivid way of teaching the law of a dead legal system like classical Roman law. But this normal *context* of efficacy presupposed in the making of internal statements must be distinguished from their normative meaning or content. (1959, 167–168)

There are many issues raised by this passage that are worth elaborating upon, but for now I want to concentrate on the last sentence. In that sentence, Hart draws a distinction between what a speaker says in using the rule of recognition and the fact normally presupposed in his saying it, namely that the rule is generally accepted and complied with in his community.[22] Here, Hart does not characterize a speaker's commitment to the rule of recognition as a presupposition. And the following passage from page 102 of *The Concept of Law* is very striking when juxtaposed with the above-quoted passage:

attribute to him any particular conception of presuppositions. In any case, Robert Stalnaker's pragmatic conception of presupposition is meant to be a broad notion that incorporates the semantic explanations of the sort that Strawson offers. *See* Stalnaker 1973; 1974. I think it is best to see Hart's notion of presupposition as something like Stalnaker's.

22. Similar passages can be found elsewhere in Hart's writings. *See, e.g.*, 1966/1982, 135–136; 1967, 93–94.

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> The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby *manifest their own acceptance of them as guiding rules*. (1961/1994, 102; emphasis added)

Here Hart seems to be espousing a form of expressivism in characterizing a speaker's speech act of making use of the rule of recognition. More specifically, he seems to be proposing a norm-expressivist analysis of legal statements akin to Gibbard's norm-expressivist analysis of statements of rationality.

These quoted passages seem to support the following analysis of legal statements. Let R be the norm that a speaker considers the rule of recognition of the legal system in his community. Then,

(AH) The speaker makes a legal statement iff he:
  (i) expresses his acceptance of R; and
  (ii) presupposes that R is generally accepted and complied with by the members of his community.

There are two crucial differences between (AH) and the two-pronged analysis that Raz seems to attribute to Hart in the passages from Raz's writings I have quoted above. First, whereas according to Raz's version, a speaker expresses acceptance of some unspecified norm, (AH) is much more specific and identifies the norm that the speaker takes as the rule of recognition of the legal system of his society as what he expresses acceptance of. Second, whereas according to Raz's version, a speaker *states* the general acceptance of and compliance with the norm he endorses, according to (AH), a speaker *presupposes* the general acceptance of and compliance with the rule of recognition.

V.

Before going on to furnish additional evidence for Hart's expressivism, some comments to clarify what I am proposing as Hart's analysis of internal legal statements may be appropriate. What I offer here are meant not as fully addressing the relevant issues but only as indications of directions I am inclined to take.[23]

Some have argued that Hart's use of the notion of acceptance does not allow him to draw a proper distinction between law and morality that he would have wanted to make, because acceptance amounts to moral endorsement (*e.g.*, Raz 1981, 454–455; 1984, 130–131). Given that, in reconstructing Hart's analysis of internal legal statements, I am borrowing from expressivist analyses developed primarily to characterize ethical statements, it may be

23. I thank Les Green for pressing me to address some of the questions discussed in this section.

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thought that I need to say something about how the acceptances involved in internal legal statements are different from any conative attitudes expressed in ethical statements.

Gibbard characterizes an acceptance of a norm involved in a statement of rationality as a set of dispositions to be governed by a norm, and to avow it in unconstrained normative discussion, as a result of the workings of mutual demands for consistency in the positions one takes in normative discussion (1990, 74, 75). Hart has strikingly similar things to say about what an acceptance of a norm amounts to (1961/1994, 57, 140; 1994, 255). Given this similarity, it can be thought that the difference between moral and legal statements has to do *not* with the difference in the acceptances involved but instead with the difference in the norms accepted. Following this line of thinking, we should rely on theories on how the norms of morality differ from those of law. According to Gibbard, for example, the norms of morality govern emotions of guilt and resentment (1990, 40–48). According to Hart, the norms of law are those that constitute a particular kind of system with particular kind of secondary norms (1961/1994, 94). Neither theory is uncontroversial, but the two give us indications of how we should proceed.

One may be inclined to think that the type of acceptances involved in internal legal statements must be somewhat weaker or paler than the acceptances involved in ethical statements. For speakers frequently utter internal legal statements without approving of the relevant laws. Taking note of this phenomenon, Raz distinguishes between *committed* internal legal statements and *detached* internal legal statements (1975/1990, 172–177). In uttering the latter type of legal statements, a speaker does not display his commitment to the relevant laws but merely pretends or simulates such commitment. What should first be noticed here is that detached internal *ethical* statements are also made.[24] Second, once we have a plausible analysis of committed internal legal statements, in the form of (AH) or something like it, we can extend it naturally to devise an analysis of detached internal legal statements. We can analyze the latter as expressions of pretended or simulated acceptances of norms.[25]

Given the procedural nature of law, it seems safe to assume that detached internal legal statements are more commonly uttered than their ethical counterparts. But that does not mean that the acceptances involved in internal legal statements are any weaker or paler than the acceptances involved in ethical statements.[26] What follows is only that pretensions or

24. Judith Jarvis Thomson's argument that no one really (seriously) asserts detached ethical statements seems to me inconclusive at best. *See* Thomson 1996, 202–204. Some of the examples that Raz uses to illustrate the existence and prevalence of detached normative statements, with much plausibility it seems, are ethical ones—e.g., a nonvegetarian's dietary advice to a vegetarian. Raz 1975/1990, 175–176.

25. I attempt such an analysis of detached internal legal statements in Toh 2003, ch. 4.

26. I am here disagreeing with Hart, who, in some of his last writings, tried to cope with some of Raz's criticisms by weakening the conception of acceptance that he espouses in *The*

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simulations of acceptances are more common in legal contexts than in ethical ones. Full-blooded acceptances, amenable to the dispositionalist characterizations of the sort that both Gibbard and Hart offer, are involved in making the paradigmatic internal legal statements that committed internal legal statements are.

Another objection that may be raised is that it is implausible to think, as (AH) implies, that every internal legal statement involves the speaker's appeal to what he considers the rule of recognition of his legal system. Here I can only agree, and point out that I am not proposing (AH) myself but only defending it as a reconstruction of Hart's proposal. (AH) has a number of problems that need to be addressed before it can be considered a plausible analysis of internal legal statements. Its reference to what the speaker considers the rule of recognition of his legal system is one such problem, and the implausibility of this feature most likely led Raz to speak of acceptances of only some unspecified norms in his own reconstruction of Hart's analysis.

Finally, I should point out that I intend (AH) as a reconstruction of Hart's analysis of all (committed) internal legal statements, including those that assert the content of the rule of recognition. In view of this, I need to deal with a passage on page 110 of *The Concept of Law* where Hart says: "The assertion that [the rule of recognition] exists can only be an external statement of fact."[27] This passage may give an impression that Hart does not think that there can be any internal legal statements asserting the content of the rule of recognition.

There are, however, some quite strong reasons to disregard that impression and the passage itself. First, the impression is inconsistent with the passages I have relied on to reconstruct the first prong of (AH). It is true that Hart often speaks of "making use of" or "presupposing" the rule of recognition, but then one must wonder why a content that is made use of or presupposed cannot be asserted as well.[28]

Second, in making the claim on page 110, Hart was motivated by an acceptance of a false dichotomy. He seems to have thought that a legal statement is *either* an internal legal statement asserting the validity of a norm *or* an external statement describing some fact. Further, given his view that the concept of validity is appropriate only within a system of norms (1961/1994, 108–109), Hart seems to have thought that a statement asserting the content of a norm that cannot be considered valid (or invalid)—because that norm is the highest norm of a system that itself provides the test of validity for other

Concept of Law. *See* Hart 1966/1982, 159–160; 1982b, 265–266. Hart did not have good reasons for doing so, as I argue in Toh 2003, ch. 4.

27. Thanks to Scott Shapiro for pointing out this passage to me, and for urging me to deal with the possible interpretation that I consider in the text.

28. In the example that Strawson inherited from Russell, what is presupposed in saying that the king of France is bald is that one and only one king of France exists. There is no reason to think that the latter content cannot be asserted but can only be presupposed.

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norms—cannot be considered an internal statement.[29] That this was Hart's reasoning can be best seen in the following passage from an endnote in *The Concept of Law*:

> Kelsen speaks of '*presupposing the validity*' of the basic norm. For the reasons given in the text (pp. 108–110) no question concerning the validity or invalidity of the generally accepted rule of recognition as distinct from the factual question of its existence can arise. (1961/1994, 293)

The appropriate response to this reasoning is to reject the dichotomy. A speaker can express his acceptance of a norm—and thus utter an internal normative statement—even if that norm is an unsystematized norm. And since the dichotomy is not a central feature of Hart's position, it is best to discount Hart's claim on page 110 of *The Concept of Law* that a statement asserting the content of a rule of recognition can only be an external statement of fact.

VI.

In this and the next four sections, I will further buttress my claim that the Hart of *The Concept of Law* is an expressivist by appealing to Hart's other writings and also the writings of some of his predecessors and contemporaries. My overall aim in these sections is to present a broad-stroked picture of Hart's philosophical environment that lends plausibility to the claim that someone in Hart's position would have found the expressivist strategy worth pursuing.

Hart, of course, was not alone in proposing an expressivist analysis of normative terms and statements containing them. It seems that expressivism was very much in the philosophical air from the 1920s onwards. And by the 1940s, it was the dominant metaethical position.

In their seminal book, *The Meaning of Meaning* (1923/1949), C.K. Ogden and I.A. Richards say that "good" "stands for nothing whatever, and has no symbolic function" (125). Instead, they continue, when we say "*This* is good," "'is good' . . . serves only as an emotive sign expressing our attitude to *this*, and perhaps evoking similar attitudes in other persons, or inciting them to actions of one kind or another" (125). In developing their emotivist analyses of ethical statements, both Ayer and Stevenson took their cues from Ogden and Richards.[30]

29. For the same reasons, according to Hart, statements asserting the contents of some unsystematized norms (such as those of primitive societies of primary norms only) cannot be internal statements (1961/1994, 109).

30. Ayer does not cite Ogden & Richards 1923/1949 in his *Language, Truth and Logic* (1935/1946, ch. 6). But later Ayer said that he had read Ogden & Richards 1923/1949 before he wrote his book and had unconsciously "plagiarized" Ogden and Richards's idea and the term "emotive." *See* Ayer 1984, 28–29. Stevenson also says in his first article advocating

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So did Glanville Williams, a British jurisprudent. Writing in 1946, Williams states that the idea of emotive function of language has become a commonplace (1946, 387 and n. 1). After endorsing Ogden and Richards's idea, Williams says that the main function of what he calls "value statements" is to express emotions (395). Williams then adds: "Just as all ethics consists ultimately of value-judgments, so does the law" (396). In a 1953 article, Hart takes notice of and gives a qualified endorsement to Williams's works (1953b, 361–362).

Beginning in 1952, Hare advocated a more sophisticated form of expressivism about ethical statements. In *The Language of Morals*, Hare claims that to make a "value-judgement" is to make a "decision of principle" (1952, ch. 4). He explains: "To ask whether I ought to do A in these circumstances is (to borrow Kantian language . . .) to ask whether or not I will that doing A in such circumstances should become a universal law" (70). This requirement of "universalizability," which runs throughout his works, was one of Hare's most important innovations. In sum, according to Hare, in uttering moral statements, we issue prescriptions that are universalizable. And in issuing prescriptions, we express preferences. Hare's prescriptivist analysis of ethical statements, like Ayer and Stevenson's emotivist analyses, is a form of expressivism. Yet Hare criticizes his predecessors for obscuring the principle-governed logic of normative concepts.

Hart seems to be characterizing Hare's view when, in a 1978 review article, after briefly discussing the emotivist analyses of Ayer and Stevenson, he says:

> The more sophisticated version of this theory, according to which approval or disapproval, to count as moral, must be attached to general principles of conduct, does allow us to say of some particular moral judgment "That is a fact" or "That is true." But we can say this only because these expressions amount to little more than an endorsement or assertion of the correctness of the application of the general principle to the particular case. (1978, 36)

Hart's own development of this idea started in a rather mangled form in a 1953 article (1953a) and eventually led to the first prong of (AH). Hart's use of the idea of rule-acceptance incorporates Hare's insistence on the principle-governed logic of normative statements.

emotivism that his term "emotive meaning" and the ideas of that article originated from the above-quoted passage from Ogden & Richards 1923/1949. *See* Stevenson 1937, 21 and n.7. Ogden and Richards's words quoted in the text partially constitute one of the two epigrams that Stevenson put at the beginning of his book (1944). Another probable source of Ayer's expressivism is Rudolf Carnap. Carnap says that value statements are commands in a misleading grammatical form and that commands are expressions of wishes (1935, 22–26). In his "Intellectual Autobiography," Carnap says that value statements possess "noncognitive meaning components, especially emotive or motivational ones" (1963, 81). He refers to this view as "my thesis of the nature of values statements," and his discussion suggests that he espoused it at least as early as his stay in Prague, which was from 1931 to 1935 (1963, 81–82). It may be that in writing his book, Ayer imported to England Carnap's expressivism along with the Vienna Circle's verificationist criterion of meaning.

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Hart has made an objection to an aspect of Hare's position in a way that helps us to locate his position in relation to Hare's. In a 1958 article, Hart says:

> To characterize morality (as, e.g., R.M. Hare does in his illuminating book, *The Language of Morals*) as *primarily* a matter of the application to conduct of those ultimate principles which the individual accepts or to which he commits himself for the conduct of his life seems to me an excessively Protestant approach. Important as this aspect or kind of moral judgment is, we need to understand it as a development from the primary phenomenon of the morality of a social group. (1958b, 100)

According to Hare, in making an ethical judgment, an agent needs only to make sure that he is willing to accept the implications of universalizing the principle that he commits himself to by making the judgment. There is no other constraint on his ethical judgment-making. Hart finds this picture of human ethics too individualistic. That, I take it, is what his complaint that Hare's approach is "excessively Protestant" amounts to. Hart's position is that although Hare's characterization may fit ethical judgments of some sort, it does not fit ethical judgments of other sorts—namely, those containing deontic concepts like rights and obligations. In this latter part of ethics, our ethical judgment-making is constrained by the actual practices of our community. That is also the case with legal judgment-making, according to Hart. I take the second prong of (AH) to be a part of Hart's attempt to offer a more collectivist or, one may say, "Catholic" approach in analyzing internal legal statements.[31]

VII.

Ayer, Stevenson, Williams, and Hare created a philosophical environment that could not have failed to impress Hart.[32] But the influence these expressivists had on Hart's thinking might not have materialized, or in any case

31. Elsewhere, I have proposed a different and, I believe, a better means of capturing the social or collectivist nature of such statements. *See* Toh 2005. Hart's discussion of the social area of morality in 1958b indicates that he would have thought that his analysis, or some variation of it, is appropriate for ethical statements of the social kind as well as for legal statements. At least Raz seems to have noticed this. *See* Raz 1981, 448 n. 11; 1993, 148. In Toh 2005, I also entertain the possibility that the analysis of internal legal statements I propose may be appropriate for an important subset of ethical statements—namely, statements of public political justification.

32. Another group of expressivist predecessors that influenced Hart were the so-called Scandinavian Realists, who offered analyses of ethical and legal statements. Axel Hägerström, a Swedish philosopher and jurisprudent who was the leader of this group, advocated an emotivist analysis of ethical statements as early as 1911. *See* Hägerström 1911. Hare, for one, considered Hägerström the first emotivist. *See* Hare 1968, 440; 1996, 67; *cf.* Stevenson 1963b, 204 n. 11. Nice overviews of Hägerström's positions and his influences are provided in Broad 1951 and Passmore 1961. A collection of some of Hägerström's writings translated by C.D. Broad was published in 1953, and Hart reviewed this volume. *See* Hart 1955. As I will go on to point out in this section shortly, Hart also reviewed a book by the Danish legal philosopher

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would have been considerably weaker, had their thinking not converged to a great extent with the works of two philosophers whom Hart greatly admired. These are Bentham and J.L. Austin (not to be confused with John Austin).

As one of Hart's former students says in an obituary of Hart, Bentham was Hart's greatest inspiration (MacCormick 1992, 6). Hart edited Bentham's works, and the most significant of Hart's writings after 1961 were articles about and reacting to Bentham's works.[33] Austin and Hart jointly taught courses on law at Oxford during the 1950s, and Hart seems to have contributed to Austin's development of the idea of performative utterances (see Austin 1956–1957, 195 n.1; 1962/1975, 7, 19–20). Two related aspects of Bentham's works on the legal discourse can be considered anticipations of the thoughts of the expressivists discussed in the preceding section.[34] I will presently discuss the first aspect in this section, and will come to the second in Section IX, after having discussed Austin's influence on Hart's thoughts in Section VIII.

One aspect of Bentham's works that is of interest to us is his observation that much of the legal discourse of his day was carried out in covertly evaluative language. Hart summarizes this aspect of Bentham's view as follows:

> [Bentham] found embedded in the language which men use to speak of the law, certain recurrent expressions which he calls in his instructive *Book of Fallacies* 'passion-kindling appellatives' and 'impostor terms.' These are words which, while appearing to be merely descriptive and so neutral as to the merits of what they describe, in fact have a disguised eulogistic or dyslogistic force. They have indeed what later philosophers of language have called emotive meaning. (1973, 27)

Alf Ross, who was a follower of Hägerström, and criticized what he perceived as a crude version of emotivism advocated by Ross. *See* Hart 1959. The endnotes to *The Concept of Law* (1961/1994) are full of references to the works of Hägerström, Ross, and their Scandinavian associates. Not only was Hart influenced by these Scandinavian philosophers' expressivism, but he also seems to have taken from them the closely connected thesis regarding the distinction between internal and external legal statements, which I discuss briefly in Section I and at greater length below. Anders Wedberg, whose 1951 work Hart cites in making the distinction (1961/1994, 291), refers to Ingemar Hedenius's *Om rätt och moral* (1941), which was the first to note the ambiguity of normative expressions. *See* Wedberg 1951, 247 n.13; *cf.* von Wright 1985, 105. Hedenius's book unfortunately has not been translated into English, but his point about the ambiguity of normative expressions can be found in Hedenius, et al. 1961, which is a symposium on Hedenius's version of emotivism.

33. Many of these were collected and published as *Essays on Bentham* (Hart 1982a).

34. In discussing Bentham, I will be relying on Hart's writings on Bentham rather than on Bentham's own works. Obviously, since our concern is with Hart's position and Bentham's influence on Hart, rather than with Bentham's own position, Hart's characterization of Bentham's position is more pertinent here than Bentham's own words. Furthermore, as Hart says in 1962/1982, 1, Bentham as a writer is in a particular need of a "middleman" between himself and the public. Hart offered himself as the middleman, and I am unaware of the availability of a better one.

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According to Bentham, terms endowed with such emotive meanings (e.g., "the maintenance of law and order") are often used to impose misgovernment and even tyranny. For this reason, he thought his job was to expose the fact that such terms are in common currency and also to advocate their removal.

In taking a dim view of a trafficking in emotive meanings and thinking it somehow less than legitimate, Bentham here resembles the Ayer of *Language, Truth and Logic* (1935/1946). According to the verificationist criterion of meaning, which Ayer and other logical positivists espoused, all synthetic statements can be empirically verified, can be reduced to statements that in turn can be empirically verified, or are literally meaningless (see Carnap 1935, 9–15; Ayer 1935/1946, 35). The chapter of *Language, Truth and Logic* in which Ayer presents his emotivist analysis of ethical statements is titled "Critique of Ethics and Theology," and in it he claims that ethical statements belong to the category of meaningless "pseudo-statements" (1935/1946, ch. 6).[35]

In a 1959 article reviewing a book by the Danish legal philosopher Alf Ross, Hart criticizes Ross for espousing a form of emotivism that seems to resemble Ayer's. Hart says:

> [T]he author's misplaced affection for the battle-cry of 'meaningless,' and his readiness to smell the rat of 'Natural Law' in every moral position not prostrate before the methods of the sciences, leads him into some absurdities. Surely it is wrong to say that the words 'just' and 'unjust' applied to a legal rule as distinct from a particular decision are 'devoid of meaning.' When we assert that a rule forbidding black men to sit in the public park is unjust we no doubt use, as our criterion of just treatment, the unstated principle that, in the distribution of rights and privileges among men, differences in colour should be neglected. In any full defence of this assertion the implicit criterion would have to be made explicit. But the dependence of concepts like justice on implicit, varying and challengeable criteria does not render them meaningless when applied to law. (1959, 163)

Hart is not here objecting to Ross's expressivism per se but rather to what he takes to be the crudity of Ross's version. This diagnosis is borne out by Hart's parallel criticism of Ross's analysis of statements of legal validity as expressions of emotions. Hart says that such statements are internal legal statements and, as such, have a "'logic' or structure [that] is different from

35. Ayer's simultaneous proposal of expressivism and his apparent skepticism about the status of ethics make it difficult sometimes to distinguish between two different ways of characterizing the *purport* of normative statements that I outline in Section II. Derek Parfit recalls in an unpublished writing that when Ayer first heard Mackie's presentation of the latter's error theory, Ayer responded by saying, "That is what I should have said." On the other hand, in some of his later writings, Ayer seeks to mollify his apparently skeptical position and says that he never meant to impugn the legitimacy of the ethical discourse. *See* Ayer 1949, 245; *cf.* Honderich 1989, 214–215.

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statements of fact or expressions of feeling" (1959, 166). He goes on to say:

> [T]hey are internal statements in the sense that they manifest acceptance of the standards and use and appeal to them in various ways. But the internal character of these statements is not a mere matter of the speaker having certain "feelings of compulsion"; for though these may indeed often accompany the making of such statements they are neither necessary nor sufficient conditions of their normative use in criticizing conduct, making claims and justifying hostile reactions by reference to the accepted standard. (1959, 167)

In sum, Hart in this 1959 article is criticizing Ross's emotivist analysis for failing to capture the principle-governed nature of internal ethical and legal statements. He is advocating in its place a form of norm-expressivist analysis.[36]

VIII.

More generally, Hart displays his unhappiness with a characterization, found in both Ayer and Ross, of ethical and legal predicates as meaningless. Stevenson disagrees with Ayer and Ross on this point and says that ethical terms have "emotive meanings" (1937, 21 and n. 8, 25). In a recent article, Hare says that Stevenson's distinction between descriptive and emotive meanings was the single most important contribution in the twentieth century to the understanding of the ethical discourse (1995, 88). What both Hart and Hare seem to object to in the characterization of ethical predicates as meaningless is the suggestion that our ethical and legal discourses are ill-founded or, if not ill-founded, then at least in some sense second-rate. In objecting to such a suggestion, both were influenced by J.L. Austin.

Austin questioned the assumption shared by many of his contemporaries, most notably by logical positivists, that the only business of statements is to describe or represent (*see* Austin 1962/1975, 1).[37] Austin asserts that those who make this assumption commit the "descriptive fallacy" (1946, 103; 1962/1975, 3), and it is this fallacy that tempts some to think that our nondescriptive discourses are somehow less than well founded. In a

36. Hart's criticism of Ross's analysis of legal statements is a little more complicated than I have indicated above. Ross says that legal statements refer to future behavior and present feelings of members of the relevant community (especially judges). Hart criticizes the first part of this proposal for failing to take account of the insider's point of view. Hart then takes the second part as formulating an emotivist analysis (rather than a subjectivist one, as it seems to), and makes the criticism I summarized in the text above. Ross responds by arguing that Hart's criticism stemmed from a misunderstanding (partly caused by a mistranslation) of his analysis of external legal statements as his analysis of internal legal statements. *See* Ross 1961, 84–88; 1962, 1190.

37. Relatedly, at around the same time at Oxford, Gilbert Ryle criticized many philosophers for taking cognition to be the primary or even the defining operation of the mind. *See* Ryle 1946, 215; 1949, ch. 2.

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footnote in his *How to Do Things with Words*, Austin mourns the extent of the descriptive fallacy by observing: "Of all people, jurists should be best aware of the true state of affairs. Perhaps some now are. Yet they will succumb to their own timorous fiction, that a statement of 'the law' is a statement of fact" (1962/1975, 4 n. 2).

Austin points out and emphasizes that many of our utterances have roles other than to describe or represent. He initially makes a distinction between descriptive and what he calls "performative" utterances. In his article "Other Minds," Austin says:

> Even if some language is purely descriptive, language was not in origin so, and much of it is still not so. Utterance of obvious ritual phrases, in the appropriate circumstances, is not *describing* the action we are doing, but *doing* it ('I do'): in other cases it functions, like tone and expression, or again like punctuation and mood, as an intimation that we are employing language in some special way ('I warn,' 'I ask,' 'I define'). (1946, 103)

Austin makes the observation (which he says he owes to Hart) that performatives are similar to legal operatives—clauses of legal documents that effect the transactions intended (1962/1975, 6–7 and n. 1). Ultimately Austin rejects the descriptive-performative distinction as a false dichotomy and argues that describing is just one of the actions we perform with words (1962/1975, 91f).

Austin nowhere gives a definitive characterization of performatives. The initial purpose for which he discusses them—namely, to contrast them to descriptive utterances—suggests that any utterances with which we perform any actions should be considered performatives. But Austin's examples suggest that he was particularly struck by a group of utterances that are reflexive in the following way. In saying "I warn you" or "I apologize," for example, the speaker warns or apologizes by uttering statements that contain the relevant action verbs. A number of philosophers take themselves as following Austin in limiting the label "performatives" to such distinctively reflexive utterances (*see, e.g.,* Hedenius 1963, 119; Ross 1972, 206; Bach 1998, 302). They use another term, "speech-acts," which Austin used only occasionally (*e.g.*, 1962/1975, 52, 147, 148), to refer generally to utterances with which speakers perform actions. I shall adopt this terminological convention henceforth.

Austin says, at the time of his writing, that his own work on performatives is but one among many then-current reactions to the descriptive fallacy (1962/1975, 12). In making this statement, he undoubtedly had in mind the emotivist analyses of ethical statements proposed by Ayer, Stevenson, and others, and also Hare's prescriptivist analysis.[38] It is probable that Austin

38. Austin actually surmises at one point that ethical statements are "perhaps intended, solely or partly, to evince emotion or to prescribe conduct or to influence it in special ways" (1962/1975, 2–3.

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also had in mind Hart's proposal for an analysis of statements containing agency-related concepts, which Hart summarizes at the beginning of his article "The Ascription of Responsibility and Rights":

> My main purpose in this article is to suggest that the philosophical analysis of the concept of a human action has been inadequate and confusing, at least in part because sentences of the form "He did it" have been traditionally regarded as primarily descriptive whereas their principal function is what I venture to call *ascriptive*, being quite literally to ascribe responsibility for actions much as the principal function of sentences of the form "This is his" is to ascribe rights of property. (1948–1949, 171)

In arguing for this conclusion, Hart begins by discussing the performative nature of various utterances in legal and nonlegal settings, and then he likens ascriptions of action and responsibility to such performatives. Hart's debt to Austin here is obvious, and Hart actually refers to Austin's "Other Minds" when he explains the quasi-performative nature of utterances like "This is his" that are used to confer, transfer, and recognize property rights (185).

Although Hart discusses legal statements in "Ascription," his main concern there was with statements containing agency-related concepts in general. In the late 1940s and early 1950s, Hart was a tutor in philosophy at Oxford, and he taught and published writings on general philosophical topics. In those years, Hart was introduced to and became a practitioner of the linguistic philosophy of which Wittgenstein and Austin were the leading exponents.[39] In 1953, Hart was elected to the Chair of Jurisprudence at Oxford, and he began then to turn his attention more fully to legal statements. In his inaugural lecture, "Definition and Theory in Jurisprudence" (1953a), Hart calls for the application of linguistic philosophy to various problems in legal philosophy.

In "Definition," Hart begins by noticing what he calls "the great anomaly of legal language," which is "our inability to define its crucial words in terms of ordinary factual counterparts" (1953a, 25). Hart's diagnosis is that the perception of anomaly stems from the faulty assumption that the function of

39. For Hart, as for many others at Oxford in the 1950s, another significant figure was Friedrich Waismann. Waismann was a member of the Vienna Circle who collaborated closely with Wittgenstein and Moritz Schlick during the late 1920s and early 1930s and was at Oxford during the 1940s and 1950s. His posthumously published book, *The Principles of Linguistic Philosophy* (1965/1997) attempts to give a systematic presentation of Wittgenstein's later philosophy. Isaiah Berlin once described Hart as a disciple of Waismann's. *See* Hacker 1996, 312 n.85. Certainly the influence seems to have been extensive. Hart's way of motivating the question, "What is law?" in the first chapter of *The Concept of Law* very much resembles Waismann's treatment of the question "What is time?" in his 1956 article "How I See Philosophy." Hart's treatment of rules in chaps. 5–6 of *The Concept of Law* bears the influence of Waismann's treatment of rules in chap. 7 of his *Principles*. And Hart's famous notion of the "open texture" of legal concepts is derived from Waismann's discussion of the open texture of most empirical concepts in "Verifiability." *See* Waismann 1945; Hart 1961/1994, ch. 7; 1970, 274.

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legal language is to describe. "The fundamental point," he says, "is that the primary function of these words is not to stand for or describe but a distinct function . . ." (31). That function, Hart tell us, is to "draw[] a conclusion from the relevant but unstated rule, and from the relevant but unstated facts of the [particular legal] case" (28). The merits of this specific proposal about the function of legal statements are open to debate, and Hart himself does not adhere to it in his subsequent writings. But Hart does remain committed to a more general conclusion that he draws in "Definition": that the statements that enunciate and apply rules, including legal statements, constitute a special form of nondescriptive speech-acts (26).[40]

IX.

At the very end of "Definition," Hart reiterates this general conclusion and adds:

> [I]t is only since the beneficial turn of philosophical attention towards language that the general features have emerged of that whole style of human thought and discourse which is concerned with rules and their application to conduct. I at least could not see how much of this was visible in the works of our predecessors until I was taught how to look by my contemporaries. (1953a, 47)

Chief among the contemporaries he had in mind was surely Austin. Chief among the predecessors he had in mind was Bentham. Here I come to the second of the two aspects of Bentham's works that probably contributed to Hart's development of his expressivist analysis of internal legal statements. Bentham's command theory of law portrays legal statements as nondescriptive speech-acts. More specifically, Bentham analyzes laws as commands of a sovereign, and a command as an expression of a will by a superior regarding the conduct of others.

Hart, however, found much wanting in Bentham's exposition of the command theory. In a 1982 article, Hart summarizes one of its key shortcomings as follows:

> [Bentham] seems consistently to have thought of commands and prohibitions as assertions or statements of the fact that the speaker has the relevant volition. . . .

40. I must concede that what I say here seems inconsistent with Hart's remarks in the introduction to *Essays in Jurisprudence and Philosophy* (1983a) disowning his claim in "Definition" that conclusions of legal reasoning are nondescriptive (1983b, 2, 5). I find Hart's general discussion surrounding these remarks very confusing and the remarks themselves particularly baffling—especially given that Hart says elsewhere in the same introduction that he considers Austin's work on performatives to be of permanent value for analytical jurisprudence (Hart 1983b, 4).

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> Though Bentham has much to say of interest on the difference between the indicative or, as he actually calls it, the assertive style of discourse and the imperative and the way in which the former may 'mask' the latter he did not succeed in identifying the radical difference of function in communication which they standardly perform. A command for Bentham was a kind of assertion differing from others only because it was specifically an assertion about the speaker's volition concerning the conduct of others. He did not recognize it as a form of non-assertive discourse. (1982b, 248)

Yet Hart goes on to observe that Bentham's failure here is understandable:

> If this doctrine, that commands and prohibitions because they are expressions of will are assertions seems a gross error, it is I think to be remembered that Bentham was not alone in failing to grasp the distinction between what is said or meant by the use of a sentence, whether imperative or indicative, and the state or attitude of mind or will which the utterance of a sentence may express and which accordingly may be implied though not stated by the use of the sentence. When I say "Shut the door" I imply though I do not state that I wish it to be shut, just as when I say 'The cat is on the mat' I imply though I do not state that I believe this to be the case. (248–249)

Here Hart is reconstructing Bentham's position along an expressivist line. He argues with much plausibility that this reconstructed version does a better job of giving effect to Bentham's intentions in characterizing legal statements as commands than does the unreconstructed descriptivist version. (251–252).

To be sure, there is an important difference between the expressivist analysis of legal statements that Hart is reconstructing on Bentham's behalf here and the expressivist analyses of ethical statements that readers of recent metaethical literature are familiar with. Gibbard, for instance, offers an expressivist analysis of what is *said* or *asserted* by a statement of rationality. Hart's reconstruction of Bentham's analysis, on the other hand, offers an expressivist analysis of what is *implied* by a legal statement. I believe, however, that a charitable reconstruction of what Hart is proposing here would push his proposal in the direction of Gibbard's. For one thing, as it stands, Hart's reconstruction of Bentham's analysis does not offer an explanation of what is being said or asserted by legal statements. I believe that Hart is here conflating the distinction between describing a mental state and expressing one—the distinction that separates metaethical subjectivism from expressivism—and the distinction between what is said or asserted and what is implied. An analogous conflation, I believe, led Hart in *The Concept of Law* to formulate his analysis in terms of presuppositions (*see* Section IV *supra*).

By his own admission, Hart could not have perceived the germs of expressivism in Bentham's works without being acquainted with the works of linguistic philosophers who were his contemporaries. And it is my conjecture that his study of Bentham's works through the spectacles of the

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twentieth-century linguistic philosophy added further motivation for his development of his own expressivist analysis of internal legal statements in *The Concept of Law*.[41]

Throughout his philosophical career—up to the time of the writing of *The Concept of Law* and beyond—Hart sought to devise a satisfactory characterization of internal legal statements as nondescriptive speech-acts. With some care, a line of development that results in (AH), the expressivist analysis of internal legal statements that I attributed to Hart, can be discerned in his early writings, which include: "Ascription" (1948–1949); "Definition" (1953a); "Legal and Moral Obligation" (1958b); and "Scandinavian Realism" (1959). The development is not always a forward one, and there are many mishandlings and conflations of various conceptual tools of linguistic philosophy, such as Austin's force-meaning distinction, Grice's implicatures, Strawson's presuppositions, and the distinction between reports and expressions of mental states. But the line is discernable.[42]

41. At the beginning of his 1982 article on Bentham that I quote from above, Hart says that his "main criticism" of Bentham's analysis, based on then-contemporary works on speech-acts, was first suggested to him by Hobbes, and further that he would not have seen the full impact of Hobbes's remarks without his acquaintance with Raz's works on exclusionary reasons (Hart 1982b, 244). Given that Raz's latter works were first published in 1975, Hart's remarks here give the impression that Hart was not aware of the significance of the works on speech-acts for analytical jurisprudence until around that time. But this is a misimpression created by Hart's rather careless remarks. In his 1982 article, not only does Hart propose an attribution to Bentham of an imperativist analysis of legal statements but he also argues that the imperatives involved in making legal statements are of a special sort. They are "peremptory" imperatives, in the sense that they are intended by the speaker to provide a reason that also excludes the addressee's acting on other reasons (1982b, 252–254). It is this peremptory nature of legal statements that Hart learned from Hobbes and Raz. Hart's awareness of the significance of speech-acts for analysis of internal legal statements predated by many years his conclusion that internal legal statements are meant to be "peremptory."

42. In recent years, some readers of Hart have argued or suggested that the semantic aspects of Hart's legal theory are unimportant and are merely reflections of the general philosophical concerns of the time in which Hart was writing, which were excessively linguistic. Such a position goes hand in hand with the general attitude that semantics is unimportant for legal theory in general. In an article titled "Hart's Semantics" (2001), Nicos Stavropoulos has argued against such a position by pointing out how central a place for semantics Hart himself explicitly reserved in his legal theory. I agree with the general tenor of Stavropoulos's article, but there is a striking oddity about Stavropoulos's argument. While rightly emphasizing Hart's concerns about what he called the "open texture" of legal concepts (which Hart inherited from Waismann's works on the vagueness of general empirical concepts), Stavropoulos relegates to a place of secondary importance Hart's preoccupation with the performative and prescriptive natures of legal language. Stavropoulos says that there are "more straightforward semantic foundations of Hart's theory," on which he concentrates (2001, 62). I believe that this is a mistake. In arguing against those who claim that semantics in general is unimportant for Hart's legal theory, Stavropoulos cites and discusses Hart's "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence" (1970). But in that article Hart says that the two great contributions that twentieth-century linguistic philosophy has made to analytical jurisprudence are Waismann's work on the open texture of concepts and Austin's work on performatives. Stavropoulos says that while the attention to the performative aspects of legal statements were central in Hart's early writings, they were later "phased out" and that they disappeared by the time of *The Concept of Law* (Stavropoulos 1996, 54 and n. 6). He cites G.P. Baker 1977 in making this claim. It is true that Baker says early in his article that Hart gradually moved away from concentrations on Austinian ideas (1977, 29). But he says later in the same article

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X.

A keen reader of the preface to Hart's *Punishment and Responsibility* (1968a) may believe that he has a ground for a forceful objection to my attributing to Hart an expressivist analysis of internal legal statements. In that preface, Hart explains his reason for not including "Ascription" (1948–1949) in that collection of articles. Hart explains that his main contention in "Ascription" is indefensible and that some of the criticisms made of it are justified (1968a, v). Hart then cites, as an example of what he thinks are justified criticisms, P.T. Geach's "Ascriptivism" (1960).

The most immediate target of Geach's polemical article is Hart's ascriptivism as argued for in "Ascription." But Geach intends his criticism, which he elaborates in a separate article, "Assertion" (1965),[43] to apply generally to any proposals that characterize various utterances as nondescriptive speech-acts. He names Hare's prescriptivism as one of his targets (1960, 251; 1965, 269). The problem that Geach saw in these proposals, subsequently dubbed the "Frege-Geach problem" because Geach attributes the insight behind the objection to Frege, has come to be considered the most acute problem for expressivism. It was considered the most significant source of dissatisfaction with expressivism, which otherwise seemed the dominant metaethical position during the 1960s. And the new proposals that Simon Blackburn (1984, ch. 6; 1988) and Gibbard (1990, ch. 5; 2002) have made as solutions to the problem have given expressivism a renewed plausibility in recent years, though many doubts about the viability of these proposals remain. Given Hart's appreciation of the Frege-Geach problem for his early ascriptivism, one may legitimately wonder whether I am still entitled to attribute to him an expressivist analysis of internal legal statements.[44]

I do not believe that the apparent inconsistency between Hart's disowning of his ascriptivism and what I consider his adherence to expressivism can be eliminated.[45] It may be that Hart never realized the full implications of

that Hart's distinction between internal and external legal statements relies on the idea that these different statements perform different speech-acts (40–41). For this reason, I believe that Baker's earlier statement is misleading. Austin's works on nondescriptive speech-acts was central to Hart's legal theory throughout his philosophical career and was never phased out. Not only do we have his statements in "Jhering" that I refer to above, but as late as 1983, in his introduction to his *Essays in Jurisprudence and Philosophy*, Hart says that Austin's arguments against the descriptive fallacy and his works on performatives are of "permanent value" for analytical jurisprudence (1983b, 4).

43. Searle has also developed the same criticism of expressivist analyses. *See* Searle 1962; 1969, 136–141.

44. I thank David Velleman and Don Regan for separately raising this objection when I first presented to them my view that Hart gives an expressivist analysis of internal legal statements.

45. The apparent inconsistency cannot be done away with by simply noting that Geach's first article was published in 1960 and that by that time Hart may have had much of *The Concept of Law*, which was first published in 1961, already written. In order to support my claim that Hart espoused an expressivist analysis, I have drawn from his writings that were published long after 1960 and even those published after 1968, when he publicly disowned ascriptivism in the preface to *Punishment and Responsibility*.

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Geach's criticisms. I want to point out, however, that whatever may have been Hart's opinion about the force of Geach's criticism as applied to his ascriptivism, he had some grounds for thinking that the Frege-Geach problem as it applies to his expressivist analysis of internal legal statements can be surmounted. In order to substantiate this last claim, I need to provide a brief explication of the Frege-Geach problem.

Geach accuses speech-act theorists of ignoring a crucial distinction between predication and assertion. Predicating some predicate of a thing can be done in both asserted and unasserted contexts. For instance, "is wrong" is predicated of lying in both:

(1) Lying is wrong.

and

(2) If lying is wrong, then getting the little brother to lie is wrong.

A speech-act theorist may propose that we explain "is wrong" by portraying uses of this predicate as acts of condemnation. Such a theory seems to give a fairly plausible explanation of what a speaker is up to in uttering statements like (1) in which the relevant predicate is not only predicated but also asserted of a thing. In uttering (1), a speaker condemns acts of lying. But Geach's point is that such a theory is a nonstarter in its explanation of what a speaker is up to in uttering statements like (2), in which the relevant predicate is, though predicated, not asserted of a thing. A speaker does not condemn lying in uttering (2).

The speech-act theorist cannot in response patch up his theory by giving a different explanation of what a speaker is up to in uttering statements with the relevant predicate in unasserted contexts. For such a patched-up account cannot explain simple reasoning such as:

(P_1) If lying is wrong, then getting the little brother to lie is wrong.
(P_2) Lying is wrong.

(C) Getting the little brother to lie is wrong.

A theory that combines different analyses of "is wrong" in the two premises and the conclusion would be unable to explain the validity of this modus ponens. For separate accounts of "is wrong" would mean that the syllogism commits a fallacy of equivocation.

A speech-act theorist desirous of solving the Frege-Geach problem has two related tasks. He must first give a uniform analysis of statements containing the relevant predicate, whether the predicate occurs in asserted or unasserted contexts. Second, he must explain the validity of inferences involving statements containing the relevant predicate and, more generally, all the entailment relationships that may hold among statements containing the relevant predicate and also other statements (see Hale 1993, 338–339;

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Dreier 1999, 558). An expressivist about normative statements may have an especially tough time with the second task even if he somehow manages to handle the first task. For what makes for the validity of an inference involving only descriptive statements is consistency among premises and the conclusion. An argument is valid if and only if it is logically impossible for the premises to be true while the conclusion is false. But an expressivist at least starts by denying that normative statements that he is analyzing are truth-apt in the usual sense.

There is some evidence to suggest that Hart was aware of this second task involved in solving the Frege-Geach problem, and that he thought that it can be carried out to satisfaction. In a 1967 article, he says:

> It has been contended that the application of legal rules to particular cases cannot be regarded as a syllogism or any other kind of deductive inference, on the grounds that neither general legal rules nor particular statements of law (such as those ascribing rights or duties to individuals) can be characterized as either true or false and thus cannot be logically related either among themselves or to statements of fact; hence, they cannot figure as premises or conclusions of deductive argument. This view depends on a restrictive definition, in terms of truth and falsehood, of the notion of valid deductive inference and of logical relations such as consistency and contradiction. This would exclude from the scope of deductive inference not only legal rules or statements of law but also commands and many other sentential forms which are commonly regarded as susceptible of logical relations and as constituents of valid deductive arguments. Although considerable technical complexities are involved, several more general definitions of the idea of valid deductive inference that render the notion applicable to inferences the constituents of which are not characterized as either true or false have now been worked out by logicians. (1967, 100)

My guess is that the then-recent logical works that Hart has in mind here include Georg Henrik von Wright's work on deontic logic and Hare's work on imperative logic (*see* von Wright 1951; Hare 1952, ch. 2; *cf.* Raz 1975/1990, 12–13).

As a matter of fact, in a later article, Hart himself (with J.L. Mackie's help) constructs on Bentham's behalf an outline of a logic of what he calls "mandates" (1971/1982, 111–118).[46] Hart proposes to account for the consistency relationships among mandates by considering what a legislator with what he calls "an exhaustive coherence survey" of his wishes would mandate (115–116). The test of coherence for mandates is whether it is logically possible according to the ordinary truth-functional logic for the sovereign's subjects to act in accordance with the mandates the sovereign accepts and not to act in accordance with those he rejects (116; *cf.* 1968b, 325–327). And the idea, I take it, is that some mandates are consistent

46. Hart opines that Bentham's work on the logic of wills was perhaps his most profound and original contribution to analytical jurisprudence and that it anticipated twentieth-century works in deontic and imperative logic. *See* Hart 1962/1982, 11–12; 1970, 272–273.

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with respect to an exhaustive coherence survey insofar as all of the relevant mandates are mandated by a sovereign with that survey.

To be sure, Hart is not here or elsewhere providing us with a fully worked out proposal for a solution to the Frege-Geach problem. He does not give us a semantic account of a normative predicate and hence does not confront the first of the two tasks I outlined above. Gibbard relies on an idea that bears some resemblance to Hart's idea of exhaustive coherence survey—what Gibbard calls a "completely opinionated credal-normative state" (1990, 95) or "hyperdecided state" (2002, 157)—to account for consistency relationships among normative opinions and also factual opinions.[47] He additionally identifies the content of a normative statement with the set of completely opinionated credal-normative states or hyperdecided states a speaker can be in while sincerely uttering that statement. This is the extra step that Hart does not take, but it is certainly open to him.

In sum, Hart had resources to propose at least a partial solution to the Frege-Geach problem. I am inclined to believe that this fact goes some way in explaining his adherence to a speech-act account—and more specifically to an expressivist analysis—of internal legal statements in the years following Geach's publication of his criticisms of speech-act theories. I readily concede, however, that I have not explained away the apparent inconsistency between Hart's disowning of ascriptivism and what I consider his continued espousal of an expressivist analysis of internal legal statements.[48]

XI.

I shall assume for the remainder of this paper that the case for considering Hart an expressivist has been well established. With the benefit of that assumption, I want to turn briefly, for the last third of this paper, to an influential criticism of Hart's conception of internal legal statements. It is Ronald Dworkin's contention in chapter 1 of his *Law's Empire* (1986) that Hart's legal theory relies on a defective semantics that cannot adequately account for some genuine legal disagreements. I want to address this claim.

47. Unlike Hart, Gibbard does not say what constitutes coherence among normative statements. Blackburn, who, like Hart, relies on the idea of joint conformity or satisfiability to account for logical coherence among normative statements (1988, 189), argues that Gibbard is thus resorting to more "Fregean" resources than he is entitled to. *See* Blackburn 1988, 195 n. 15; 1992a; *cf.* Railton 1992, 963 n. 4. Gibbard argues, convincingly in my view, that Blackburn's idea of joint conformity or satisfiability is inadequate for the purpose at hand. *See* Gibbard 1992a, 973–974. Hart's account is equally vulnerable to Gibbard's criticism. But it must be kept in mind that I am not arguing here that Hart's solution to the Frege-Geach problem is adequate or on the right path but rather that Hart had some reasons for thinking that the Frege-Geach problem was solvable. There is some evidence to suggest that Hart to an extent anticipated objections like Gibbard's. *See* Hart 1968b, 327 n. 43.

48. I am not the only one who has despaired of explaining away the apparent inconsistency. G.P. Baker, too, takes notice of the Frege-Geach problem as it applies to Hart's early ascriptivism and points out that his later reliance on speech-acts in *The Concept of Law* is equally vulnerable. *See* Baker 1977, 30, 41.

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A text as rich and (to this reader) at times confusing as Dworkin's chapter 1 may warrant a variety of legitimate interpretations. Some stage-setting may be helpful in indicating how I understand the challenge that Dworkin's argument poses.

Some influential legal philosophers have argued that Dworkin's argument in chapter 1 of *Law's Empire* is just a superficial variation on his older arguments and that, here as elsewhere, Dworkin is questioning the compatibility of the "conventionality" of the criteria of legal validity, which is the defining feature of legal positivism, and the possibility of controversy or disagreement about the content of those criteria (*e.g.*, Coleman 2001a, 155). I take a somewhat different view. Dworkin seems to think that his argument in chapter 1 of *Law's Empire* (or some slight variation of it) applies to all (what he calls) "semantic theories of law," and among such theories are nonpositivist theories as well as positivist ones (1986, 35–37). And although he clearly concentrates on Hart's legal theory, he seems to take Hart's theory as representative of semantic theories of law in general rather than of only legal positivist theories.

I believe that once this view of Dworkin's argument is taken, we come to see that what is needed to defend Hart's position is not so much showing the compatibility of the conventionality of the criteria of legal validity and the possibility of controversy about the content of those criteria. Something *like* this task needs to be carried out, and I will attempt to do so in Section XV below. But there is a more central and pressing task. As I will explain in the next two sections, that task is to show that Hart's theory has resources to furnish what Dworkin (in an unpublished paper) has helpfully called "the fulcrum of disagreement" (1994, 14).

XII.

Dworkin classifies Hart's legal theory as a "semantic theory of law" and characterizes such theories as follows:

> Philosophers who insist that lawyers all follow certain linguistic criteria for judging propositions of law, perhaps unawares, have produced theories identifying these criteria. I shall call these theories collectively semantic theories of law. . . . (1986, 32)

> Semantic theories suppose that lawyers and judges use mainly the same criteria . . . in deciding when propositions of law are true or false; they suppose that lawyers actually agree about the grounds of law. (1986, 33)

These passages are far from transparent, and in particular it is not clear what Dworkin exactly has in mind by "grounds" and "criteria" of law. The impression I get from these and many other passages in *Law's Empire* is that

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at least two different sets of senses of these key terms are at play in Dworkin's discussion of semantic theories of law.

The two sets of senses of the key terms stem from what may be considered an ambiguity of the term "truth-conditions." Philosophers committed to a certain research program in philosophy of language use the term "truth-conditions" to refer to the meanings of sentences. And that is how Dworkin himself seems to be using the term in the following endnote in *Law's Empire*:

> The philosophers I have in mind, whose theories are described in the following pages, recognize that the most distinctive aspect of law as a "social phenomenon" is that participants in institutions of law deploy and debate propositions of law and think it matters, usually decisively, whether these are accepted or rejected. The classical theories try to explain this central and pervasive aspect of legal practice by describing the sense of propositions of law—what these mean to those who use them—and this explanation takes the form either of definitions of "law" in the older style or accounts of the "truth conditions" of propositions of law—the circumstances in which lawyers accept or reject them—in the more modern style. (1986, 418–419 n. 29)[49]

At other times, however, Dworkin seems to use the term "truth-conditions" or its cognates to refer not to the meanings of legal statements but rather to their justificatory grounds, rationale, or evidence (as broadly construed). And this ambiguity in his conception of "truth-conditions" seems to carry over into his conceptions of "grounds" and "criteria." For instance, at one point very early in *Law's Empire*, Dworkin says the following about the "grounds" of law:

> 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. (1986, 4)

Clearly, the word "because" in the last sentence of this passage designates a justificatory or evidential relationship rather than a semantic one.

These passages together indicate that sometimes by "grounds" and "criteria" Dworkin has in mind the meanings and more specifically truth-conditions (of the standard philosophical usage) of internal legal statements.[50] At other times, by "grounds" and "criteria" Dworkin has in mind not so much the meanings of legal statements but rather what seems more appropriately called "grounds"—namely, their justificatory bases or

49. Thanks to Scott Shapiro for reminding me of this endnote.
50. This is Raz's conjecture in 1998, 23.

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evidence.[51] What Dworkin means precisely by "semantic theories of law" depends, then, on which of the two sets of senses of "grounds" and "criteria" he really means to employ.

XIII.

The label "semantic theories of law" gives us a pretty good indication that by "grounds" and "criteria" Dworkin—at least *officially*—has in mind the meanings (rather than the justificatory bases) of internal legal statements. According to this official version of semantic theories of law as Dworkin sees them, all competent lawyers of any single legal system agree on the meanings of internal legal statements.

Why does Dworkin classify Hart's theory as a semantic legal theory? The answer is provided in the following passage, in which he summarizes what he takes to be Hart's position:

> [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 . . . 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. (1986, 34)

Dworkin also says that Hart's "root idea" is "that the truth of propositions of law is in some important way dependent upon conventional patterns of recognizing law . . ." (35). Although Dworkin's phrases "in virtue of" and "dependent on" are ambiguous in the same way that, as I argued in the preceding section, the words "grounds" and "criteria" are, I am here reading the former two phrases as referring to the relationship between statements and their meanings. In effect, according to Hart's theory, as Dworkin characterizes it, in uttering an internal legal statement asserting the legal validity of some norm N, a speaker is saying, roughly: "N is consistent with the norm that is jointly accepted as the rule of recognition of this society."

Given this conception of semantic theories of law in general and of Hart's theory in particular, it is easy to see why Dworkin complains that such theories are unable to account for some genuine legal disagreements. Assume that there is in a community a controversy about what the prevailing rule of recognition is. Let us say that one group of members think that R_1 is the true rule of recognition in their society, whereas another group think that

51. This second interpretation is implicit in W.J. Waluchow's discussion in 1994, 9–11. The two sets of senses of "grounds" and "criteria" would be equivalent only if we adopt—or, since Dworkin is concerned here to interpret Hart's position, only if we can attribute to Hart—a controversial epistemic conception of meaning (*cf.* McGinn 1980; Skorupski 1997). Dworkin certainly offers no argument for such an attribution.

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R_2 is. Then, in a dispute as to whether some particular norm N is legally valid, a member of the first group would be saying "N is consistent with R_1," whereas a member of the second group would be saying "N is inconsistent with R_2." It is clear that such two people would not be having a genuine legal disagreement; rather, they would be talking past each other.

One may try to defend semantic theories of law as Dworkin conceives them by pointing out that a speaker of a legal statement would not be saying merely that some norm is consistent (or inconsistent) with the norm he considers the rule of recognition, but also that the latter norm is generally accepted and complied with by the members of his community. It would follow that two speakers appealing to two different rules of recognition would be having a genuine disagreement. In effect, they would be having a factual disagreement about which rule of recognition is accepted and complied with by the members of their community. But Dworkin's point is that there are in legal contexts not only what he calls "empirical disagreements," which occur when judges and lawyers agree about what facts need to obtain for a particular legal statement to be true but disagree about whether those facts do actually obtain; but also what he calls "theoretical disagreements," which occur when judges and lawyers agree on all factual questions but still disagree on "what the law really is" (1986, 4–5). Dworkin refers to some real legal cases to show that theoretical disagreements do actually occur and that when they do, all participants—that is, lawyers, judges, legal commentators, and so on—treat the disagreements as disagreements about what the law is rather than about what the law should be (15–30).

Dworkin's view is that Hart and other semantic legal theorists cannot account for occurrences and prevalence of such theoretical legal disagreements. Once again, a semantic legal theorist portrays a speaker who utters a legal statement as asserting that a particular norm is consistent with the norm that is accepted by the members of his community as the rule of recognition. Consequently, in the face of theoretical legal disagreements, which persist despite discussants' consensus on all factual matters, a semantic legal theorist has to say that at least one of the discussants is failing to use legal statements properly. The disagreement is only an apparent one that persists only because at least one discussant is failing to see that all legal matters are settled by factual inquiries. It follows that in having any theoretical disagreements, according to a semantic legal theorist, discussants fail to have genuine disagreements and in effect talk at cross-purposes.

That Dworkin is seeing the issue of legal disagreements this way can be seen in the following passage from the last page of chapter 1 of *Law's Empire*:

> So [according to Hart's semantic theory of law] the two judges are not really disagreeing about anything when one denies and the other asserts [a legal] proposition. They are only talking past one another. Their arguments are pointless in the most trivial and irritating way, like an argument about banks when one person has in mind savings banks and the other riverbanks. (1986, 44)

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According to Hart's semantic legal theory, as Dworkin conceives it, real legal disagreements can take place only when discussants agree about the content of the rule of recognition of their legal system. Dworkin argues that Hart is incapable of accounting for some genuine legal disagreements because discussants of legal matters sometimes disagree about the content of the rule of recognition (4–5). Inevitably, according to Dworkin, Hart and other semantic legal theorists are condemned to portray discussants of legal matters who do not agree about the grounds or criteria of law as talking at cross-purposes.

What is incumbent upon anyone wanting to defend Hart against Dworkin's argument is to devise on Hart's behalf a semantics of internal legal statements that is better than the one that Dworkin attributes to Hart and other semantic legal theorists. In particular, one must devise a semantics that shows what discussants have in common even when they disagree about the content of the rule of recognition of their legal system. According to Dworkin's interpretation of Hart's theory, the fulcrum of any genuine legal disagreement is the content of the rule of recognition that is jointly accepted by all knowledgeable members of the relevant society. The problem, as Dworkin sees it, is that that fulcrum disappears once there is a controversy about the content of the rule of recognition.

XIV.

What I am conjecturing is that an expressivist semantics—(AH) or something very much like it—is the better semantics we need.

This conjecture is based partly on what I see as a striking parallel between Dworkin's criticism of semantic theories of law (as I reconstruct it in the preceding sections) and Moore's and the early emotivists' criticisms of naturalistic descriptivist analyses of ethical statements. In Section II, in outlining various motivations for pursuing the expressivist strategy, I pointed out that both Moore and the expressivists following him reject naturalistic analyses of a normative term because such analyses cannot explain the noncontingent connection between assessments using the relevant normative term on the one hand and the assessing person's possession of reasons or motives on the other. A closely related consideration that Moore and the early emotivists also used against naturalistic analyses is that such analyses cannot explain or account for certain genuine ethical disagreements.

To take Moore's example, imagine two moral philosophers disagreeing with each other, one claiming that good is pleasure, and the other claiming that good is the object of desire (*see* Moore 1903/1993, 62–64). If we take these philosophers as adhering to two different naturalistic definitions of "good," then we cannot treat their disagreement as a genuine one. They would in effect be talking past each other. It follows that in order to see these philosophers as having a genuine ethical disagreement, we must

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characterize them as agreeing on the definition of "good" and arguing about what things are good. Moore goes on to argue that "good" is a simple, unanalyzable, nonnatural concept that designates a simple, nonnatural property that supervenes on the natural properties of good things. Genuine ethical disagreements are disputes as to which natural properties the simple, nonnatural property of goodness attaches to.[52]

As I pointed out in Section II, expressivists do not accept Moore's nonnaturalistic metaphysics. For this reason, they do not accept Moore's explanation of ethical disagreements. But their rejection of naturalistic analyses of normative terms is motivated by Moorean considerations, including the failure of such analyses to explain genuine normative disagreements. Like Moore, Stevenson considered the ability to explain genuine disagreements to be one of the key requirements for an adequate theory of ethical judgments (*see* 1937; 1948). And Stevenson thought, again like Moore, that there must be something common between discussants for them to have a genuine ethical disagreement. For example, a naturalistic analysis of "X is good" as "I like X" would be a defective semantics. A speaker who says "I like X" and another who says "I don't like X" are not disagreeing. Stevenson thought that his emotivist analysis could do better and further thought that the emotive meaning of "good"—that is, its characteristic uses to express the speaker's endorsement and to elicit the same attitude in others—is what is common between discussants of ethical matters and enables them to have genuine ethical disputes.[53]

The more recent expressivists have richer views of ethical disagreements than did Stevenson. Whereas for Stevenson, disagreements in attitudes are disagreements as to what one ought to do in the actual world, more recent expressivists have proposed views that also allow disagreements as to what one ought to do in hypothetical or counterfactual situations (*see, e.g.*, Gibbard 2003, ch. 4). Yet these more recent expressivists have essentially adhered to Stevenson's view as to what makes normative disagreements possible. They too consider the meanings of normative terms as furnishing fulcra of normative disagreements. According to expressivists, whether or not discussants agree or disagree about any factual matters, they can be characterized as having genuine normative disagreements (and not talking at cross-purposes) if they can be seen as using normative terms in the same way—namely, to express their own normative opinions and to influence others' normative opinions and actions.

The resemblance between Moore's and the emotivists' criticism of naturalistic descriptivist analyses of ethical statements and Dworkin's criticism of what he sees as Hart's semantics of internal legal statements is

52. I have done a bit of reconstruction in this paragraph. Moore seems constantly to confuse concepts with properties.

53. Unlike Stevenson, Ayer did not think genuine disagreements in attitudes are possible. *See* Ayer 1935/1946, 107.

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undeniable.[54] Dworkin has in effect misinterpreted Hart's analysis of internal legal statements as a naturalistic descriptivist analysis and deployed against it the very criticism that expressivists have used against such theories.

I believe that the misinterpretation of Hart's analysis stems from either of two related confusions. One possibility is that Dworkin is confusing Hart's analysis of *external* legal statements that assert the existence of a law with his analysis of *internal* legal statements.[55] As I say at the beginning of this paper, Hart analyzed external legal statements as descriptions of acceptances of norms by members of a community. Dworkin may be taking this analysis as Hart's analysis of internal legal statements.[56]

Another possibility is that Dworkin is taking only one part of Hart's analysis of internal legal statements as Hart's entire analysis. If I am right in attributing (AH) to Hart, then Hart does not offer a purely expressivist analysis of internal legal statements. Instead, what he offers is a hybrid analysis. In making an internal legal statement, according to (AH), a speaker (i)

54. Incidentally, this resemblance is not entirely accidental. Many features of what could be called Dworkin's "interpretive semantics," which Dworkin recommends as an improvement on the semantics of semantic legal theories, seem to have been derived from W.B. Gallie's work on "essentially contested concepts." *See* Gallie 1956a, cited in Dworkin 1975, 103 n. 1; *cf.* Gallie 1956b. For instance, for both Gallie and Dworkin, the necessary fulcrum of a normative disagreement is a "concept," and discussants disagree by proposing competing "conceptions" of the same concept. Gallie was proposing his work within a philosophical setting provided by Moore and emotivists. My impression is that he was unhappy with the picture of normative disagreements provided by emotivists because the emotivist semantics available at the time was not good or rich enough to provide plausible accounts of disagreements involving certain thick normative (or in Gallie's own words, "essentially appraisive") terms. The current expressivists have more sophisticated semantics that can handle such thick terms. *See* Blackburn 1992b; Gibbard 1992b; 2002, 163–165. The similarities between Gallie's and Dworkin's conceptions of normative discourses also suggest the possibility of attributing an expressivist semantics to Dworkin. *See* note 58 *infra*.

55. It is my impression that Dworkin has consistently confused Hart's expressivist analysis of internal legal statements and his descriptivist analysis of external legal statements. His characterization of Hart's theory as a "social rule theory" and his specification of Hart's "practice-conditions" for existence of rules in "The Model of Rules II" (1972, 49–51) seem to be motivated by his misinterpretation of Hart as proposing a descriptivist analysis of internal legal statements. (Dworkin's further assumption, mistaken in my view, that such practice-conditions should explain why we ought to comply with rules motivates his most fundamental criticism of Hart's theory in the same article. *See* 1972, 48–49, 50–51, 57.) The Argentinean philosopher Eugenio Bulygin has repeatedly criticized Dworkin and Raz for ignoring the distinction between internal and external legal statements. *See* Bulygin 1981; 1982; *cf.* 1999. In making this criticism, Bulygin draws on Hedenius's point about the ambiguity of deontic expressions. As I point out in note 32 *supra*, Hart also learned the distinction between internal and external legal statements from Hedenius, via Wedberg 1951. Although I became aware of Bulygin's writings after writing initial drafts of this paper, I have benefited much from his insights and clear-headed presentations in my subsequent revisions.

56. As I point out at the end of Section II, in giving an "oblique" analysis of normative expressions, an expressivist is explaining what speakers are up to in their typical *uses* of such expressions. Dworkin is therefore correct in saying that Hart relies on a "use" theory of legal concepts. *See* Dworkin 1986, 32–33. But he is wrong to think that such use theories furnish "truth-conditions" of legal statements (1986, 32–33, 418–419 n. 29), and this claim betrays his confusing Hart's descriptivist analysis of external legal statements with his expressivist analysis of internal legal statements. An expressivist analysis, as originally conceived, specifies assertibility-conditions of normative statements that are not truth-apt in the usual sense.

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displays his acceptance of a particular norm as the rule of recognition of his legal system; and (ii) presupposes that this rule of recognition is generally accepted by the officials of his community. It may be that Dworkin is taking the second descriptivist prong of (AH) as Hart's entire analysis.

These two diagnoses are related because the two mistakes they attribute to Dworkin are related. Hart considered the content of the second prong of his analysis of internal legal statements as what is common between the meanings of internal and external legal statements (*see* 1961/1994, 102–104, 108–110; 1966/1982, 145).

Once we realize that Hart proposes an expressivist analysis of internal legal statements, we must reconsider Dworkin's contention that Hart's theory cannot explain some genuine legal disagreements. It is not an exaggeration to claim that expressivist analyses are specifically designed to explain normative disagreements. According to an expressivist analysis of internal legal statements, two discussants who disagree about any factual matters—including the matter of what norms are accepted and complied with by the members of their community—can have a genuine legal disagreement so long as they are both uttering legal statements with the requisite intentions of expressing their own legal opinions and of influencing each other's legal opinions and actions. Such an analysis can also account for legal disagreements that persist despite discussants' complete agreement on all factual issues. Even when they agree about what norms are accepted and complied with by the members of their community, they can express their own opinions and try to change others' opinions and actions.

Nor should the second, descriptivist prong of (AH) be taken as vindicating Dworkin's characterization of Hart's analysis of internal legal statements and his criticism. Both Stevenson and Hare also considered themselves as offering hybrid analyses of ethical statements. What they emphasized was the *primacy* of the emotive or prescriptive meaning of ethical predicates. Similarly, the first prong of Hart's analysis is the primary one. Hart says that the *normal* use of internal legal statements is in the context in which the rule of recognition accepted is "efficacious"—that is, more often complied with than not (1959, 168; 1961/1994, 103–104). But he goes on to say that even in contexts in which the condition of efficacy does not obtain and speakers are aware of such presupposition failures, internal legal statements may be used, and to good effect (1959, 168; 1961/1994, 104). We see here the importance of conceiving the descriptivist prong of Hart's analysis as a presupposition rather than a statement or an assertion (as Raz's reconstruction makes it out to be). For we do not want to portray speakers' dispositions to express their acceptance of legal norms as necessarily hampered by their disbelief in the contents of the descriptivist prong.[57]

57. A failure of a semantic presupposition would render the relevant assertion or statement defective, but that is not the case with a pragmatic presupposition. *See* Stalnaker 1973, 451–452;

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My proposal is that the normative meaning of the first prong of Hart's analysis of internal legal statements can furnish the needed fulcrum of legal disagreements that discussants share even when they disagree about the content of the rule of recognition of their legal system. In effect, a speaker who believes that R_1 is the rule of recognition of his community, and another speaker who believes that R_2 is the rule of recognition of the same community, can have a genuine legal disagreement by uttering roughly the following two statements, respectively: "Let us act according to a norm that is a part of a system of norms with R_1 on top and other secondary norms in the middle tiers!", and "Let us act according to a norm that is a part of a system of norms with R_2 on top and other secondary norms in the middle tiers!" Clearly, such two speakers share a normative meaning despite their disagreement about the content of their community's rule of recognition. Insofar as they share this meaning, they do not talk at cross-purposes.

As I have said above, (AH) is not without defects, and the precise details of a more plausible analysis of internal legal statements would have to be worked out, and such a working-out would involve many difficulties. But (AH) already gives us very good ideas as to how to deflect Dworkin's argument in chapter 1 of *Law's Empire*. For this reason, I doubt that Dworkin would have made the criticism of Hart's legal theory that he makes there had he realized that Hart offers an expressivist analysis of internal legal statements.[58]

1974, 54. This is one advantage of conceiving the presupposition of the second prong of (AH) as a pragmatic one.

58. As Larry Sager has helpfully pointed out to me in conversation, it is possible to read Dworkin as proposing a semantics much like the one that I am attributing to Hart in this paper. According to such a reading of Dworkin, a speaker of an internal legal statement expresses an acceptance of norms (i) adherence to which by community members best explains their practices and institutions; and (ii) that best justify the same practices and institutions. (Such an expressivist reading would be a competitor to Stavropoulos's recent attempt to devise a Dworkinian semantics using the causal theories of reference à la Kripke and Putnam. *See* Stavropoulos 1996, 129–136.) It is not clear, however, how satisfactory an analysis of internal legal statements such an expressivist analysis would be. The analysis seems to tether legal judgments too tightly to existing practices and institutions and for this reason would have a great difficulty accounting for radically novel legal conclusions. I should say here that (AH) also suffers from this problem. I do think that internal legal judgments, unlike, for instance, some ethical judgments, are constrained by practices. But we need to be careful in specifying exactly how practices constrain such judgments lest we fail to capture legal judgments that advocate radically new legal conclusions. I try to propose an expressivist analysis that does the trick in Toh 2005. In any case, there are reasons to think that Dworkin would eschew any expressivist reading of his views. One reason is his assumption that any expressivist view is a skeptical view that unavoidably undermines our normative commitments. Another is what appears to be his assumption that normative thoughts and practices cannot be characterized adequately in purely descriptive vocabulary. Expressivism takes such "describability" for granted and hence would be objectionable to Dworkin. Dworkin's two assumptions are most forcefully displayed in Dworkin 1996.

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XV.

I take myself as having provided in the preceding section at least a rough outline of a semantics that Hart has at his disposal to explain legal disagreements between people who disagree about the content of the rule of recognition of their legal system. That, as I see it, is the central task involved in deflecting the argument in chapter 1 of Dworkin's *Law's Empire*.

There are additionally some secondary tasks that have to do with showing how Hart's analyses of some external legal statements should be revised or adjusted given the possibility that the members of a community may not jointly accept any rule of recognition. As I pointed out at the beginning of this paper, according to Hart, a legal system exists in a community if the officials of that community accept a rule of recognition and the nonofficial members at least comply with the norms that are valid according to the rule of recognition. And a law prevails in a community if a norm with the content of that law is valid according to the rule of recognition of the prevailing legal system. Both of these neat proposals need to be revised given the possibility in a community of lack of a jointly accepted rule of recognition.

Let me here, in closing, offer some remarks about these two issues.[59] As in Section V, what I offer here are only preliminary and are meant only to be indicative of the directions I am inclined to pursue in addressing these issues.

First, with regard to the issue of external legal statements attributing a legal system to a community, Hart does opine that a community's adoption of secondary norms, of which the rule of recognition is one, marks a transition from a regime of primary norms only to what is "indisputably" a legal system (1961/1994, 94). But his discussion of international law in chapter 10 of *The Concept of Law* clearly shows that Hart is willing to attribute, if not a legal *system*, then at least what could be called a "legal regime" to a community without settled secondary norms.[60] Despite the obvious fact that the norms of international law are not held together by a commonly accepted ultimate

59. It does not seem that Hart considered that his ways of addressing these issues in *The Concept of Law* were definitive or even satisfactory. *See* Hart 1968b, 310, 334–335. In pursuing, however tentatively, my proposals for these two problems, I am here assuming that arguments like the one that Saul Kripke finds in Wittgenstein's writings, according to which attributions of norms cannot be descriptive judgments but are themselves normative judgments, do not work out. *See* Kripke 1982; *cf.* Ginet 1992; Gibbard 1994, 110–111. Thanks to Scott Shapiro for urging me to address the two secondary issues. I should say that Shapiro does not consider these issues secondary. And I doubt that he would completely endorse my way of formulating the two issues as those of delineating attribution-conditions of legal systems and of laws or, more specifically, as analyses of external legal statements attributing legal systems and laws.

60. We should remind ourselves that Hart's primary goal in *The Concept of Law* is *not* to come up with a set of attribution-conditions for legal *systems*. Instead, as his remarks in the preface and chap. 1 show, he is primarily interested in specifying what an observer means in claiming that a community is governed by laws (whether or not these laws constitute a system) and in determining exactly how such a claim differs from one that says that a community is regulated by a morality and from another that says that its members are subject to coercive measures (1961/1994, viii, 6–8).

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norm of legal validity, Hart insists on the genuinely legal nature of such norms because they display other salient features of law. In particular, there is the important fact that a set of commonly accepted secondary norms of international law, though currently nonexistent, would not be an absurdity if they were to exist (1961/1994, 230, 236–237).

Hart's discussion in chapter 10 of his book gives us some indication of what he thinks an observer means when he attributes to a community a legal regime when the members of that community do not jointly accept a rule of recognition. Roughly, the following seems warranted: A legal regime exists in a community insofar as the members of that community regulate their conduct according to a set of norms the applicability of which they treat as *amenable* to authoritative determination by an appeal to an ultimate norm of legal validity. The important point here is that this last fact can obtain even when there is no actual or current joint acceptance, in the community in question, of any norm as its rule of recognition.

Arguably, we could go further. Hart himself seems ultimately unready to talk about a "system" of laws when there is no jointly accepted rule of recognition (1961/1994, 236). We could be a bit bolder and consider the following conditions for attributions of legal systems, even in the absence of a jointly accepted rule of recognition. A community has a legal system insofar as its members aim at the discovery and maintenance of such a jointly accepted ultimate norm of legal validity. In other words, even if the members disagree about the content of the rule of recognition, if they act as if there is a right answer to the question of what the true rule of recognition is, it seems that we can attribute to their community a legal system.[61]

We can take advantage of this last proposal in carrying out the second secondary task–that of specifying the attribution-conditions of individual laws. The following seems on the right track: Even in the absence of a clear consensus among the members of a community about the content of their rule of recognition, certain laws are to be attributed to that community if the norms with the contents of those laws are jointly accepted, or they closely

61. I believe that the proposed existence-conditions for legal systems accurately depict the facts involved in the actual legal cases that Dworkin uses to illustrate the possibility and even prevalence of theoretical disagreements in legal contexts. *See* Dworkin 1986, 15–30. Also, I should point out that in talking about the members of a community acting "as if there is a right answer" to the question of what the content of the rule of recognition is, I am not endorsing what is sometimes called the "right answer thesis," which Dworkin defends in his early writings, according to which there is no indeterminacy in law. *See* Dworkin 1967; 1975. Nor am I saying that the members themselves have to endorse (however implicitly) something like the right answer thesis for there to be a legal system. I am saying merely that for there to be a legal system, the members have to, to a certain unspecified extent, pretend (or act "as if") there are right answers when questions about the content of the rule of recognition arise. And that view is consistent with thinking that judicial discretion (or what Dworkin calls "strong" discretion) is an actual and unavoidable feature of legal adjudication. Even Hart says that judges who confirm the existence of judicial discretion in their extrajudicial writings about the judicial process use a "ritual language" in their on-duty hours that seems to indicate their commitment to the right answer thesis. *See* Hart 1994, 274.

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entail or are closely entailed by jointly accepted laws, and the members treat such jointly accepted laws as owing their legal validity to the true rule of recognition, whatever that happens to be. This proposal is certainly not as neat as the one that I attribute to Hart at the beginning of this paper. And according to this proposal, there will be many cases in which the existence of a law is less than clear-cut. But I am not sure that these features of my approach are necessarily its drawbacks.

The two issues I have addressed in this section are important, and I have here offered only scant and tentative comments. But I believe that they offer some outlines of avenues that may be worth pursuing in addressing the issues more satisfactorily.

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