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POSITIVISM BEYOND THE HARTIAN PALE

POSITIVISM BEYOND THE HARTIAN PALE

By

MATTHEW GRELLETTE, B.A., M.A.

A Thesis

Submitted to the School of Graduate Studies

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ABSTRACT

This dissertation offers a critical analysis of the dominant philosophical theory of law today: Hartian positivism. The arguments proffered are not meant to strike at the underlying methodology of that account. Rather, they are intended to demonstrate that it performs sub-optimally with regard to its own jurisprudential aspirations. More specifically, this thesis contends that the Hartian position is unable to model the law in a way that captures the de facto terms of institutional governance, while also being able to give due theoretical credence to the normative structures and mechanisms that are widely deployed to regulate it. With this conclusion in hand, a new theory of law is suggested – one that seeks to stay true to the methods and aspirations of its predecessor, but which has been constructed so as to surpass its descriptive-explanatory capabilities. In this way, the following dissertation means to push analytic jurisprudence beyond the Hartian pale, and into new areas of theoretical discourse.

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Introduction:

In the modern world, governmental agencies predominantly pursue their ends by promulgating and enforcing policies and regulations that give shape and texture to political relations at both the personal and municipal levels. Consequently, many scholars have experienced a powerful compulsion to try and make sense of those activities as a distinctive kind of social phenomenon. That is, they have tried to understand the nature of law, as such. In its most basic description, the current work seeks to contribute to that project.

As with any such theoretical endeavor, there are a number of disparate analytic paradigms that legal scholars have developed in order to offer an account of their subject. Thus, the first chapter of this work has been dedicated to exploring some of those alternatives. This effort is doubly important. For, within legal theory, accepted patterns of argumentation can differ quite significantly from one form of analysis to another. Thus, by offering the reader a sense of this project's place within the jurisprudential field, this chapter also serves to set out and explain the specific terms of debate for what follows.

With the discursive terms of this thesis laid bare, the second chapter offers a critical analysis of "the dominant theory of law today": a position known as Hartian positivism.[1] The arguments proffered are not meant to strike at the underlying methodology of that understanding of law. Nor, are they intended to reveal any blatant theoretical errors, such as category mistakes, that have somehow escaped notice during

[1] Brian Tamanaha, "The Contemporary Relevance of Legal Positivism," *Australian Journal of Legal Philosophy* 32 (2007), 1.

the half-century of its theoretical ascendency. Rather, careful consideration reveals that this brand of legal theory performs sub-optimally with regard to its own jurisprudential aspirations. More specifically, none of its incarnations are able to model the law in a way that captures the de facto terms of institutional governance, while also giving due weight to the normative structures and mechanisms that are deployed to regulate it.

Despite the conclusion that Hartian positivism is subject to certain limitations, that theory's contribution to legal scholarship is simply too important for it to be quickly brushed aside. Thus, the third chapter begins by attempting to discern just what it is about the nature of this model of law that makes it susceptible to the criticisms that have been launched against it. These efforts reveal that a number of the defining characteristics of the Hartian position conspire to insure that there is no version of it that is capable of overcoming the problems previously identified.

At this point the thesis undergoes a significant change in tenor, insofar as it moves to make a more positive contribution to the field of jurisprudence. Specifically, with the diagnosis of the Hartian position in hand, a new theory of law is suggested – one that seeks to stay true to the methods and aspirations of its predecessor, but which has been constructed so as to surpass its theoretical capabilities.

In order to properly establish its theoretical capacities, this newly proposed understanding of law – which is dubbed "warrant-based positivism" – is tested against the Hartian account on a wide variety of fronts. The results, it is argued, are very promising. However, at the same time it is admitted that this ostensible success is not sufficient to establish this alternative account of law as a viable replacement for Hartian legal theory. Rather, it is necessary to look beyond the terms of a direct theoretical comparison between these two positions, in order to explore the viability of warrant-based positivism in its own right. With this in mind, the fourth chapter has been dedicated to justifying certain theoretical peculiarities of the newly proposed account that are likely to raise the hackles of other scholars - particularly those who have historically supported the Hartian project.

Given the foregoing synopsis, this dissertation might be thought of as a rather

ambitious endeavor. For, not only does it seek to problematize what is currently the most widely accepted brand of legal theory, it actually purports to improve upon it. Yet, this work is ultimately meant to realize a slightly more modest end. That is, even if the criticism of the Hartian position is not ultimately found to be convincing, and even if the warrant-based understanding of law is viewed skeptically, it still serves to reveal that there are routes of theoretical development that have yet to be explored, when attempting to understand the social phenomenon that we think of as the law.

Chapter 1:
The Theoretical Backdrop

As an exercise in legal theory, this essay is situated within a number of different contexts of inquiry. Which is to say that there are both broad methodological and more particular theoretical paradigms by which it is oriented. Within this chapter, I will be preoccupied with the old standby of making my understanding of these contexts explicit. In this way, the direction of this work, and the suppositions that undergird it, will be made readily appreciable to the reader. To accomplish this task, the current chapter will be broken down into two main sections. The first contains a description of the analytical and methodological orientation that will be taken up herein. The second is comprised of an elucidation of the theoretical background from which the current project emerges, and with regard to which it can be appreciated and judged.

But, before proceeding with these discussions, one point must be emphasized. Specifically, the discussion that follows is not meant to serve as any kind of comprehensive justification for the approach to be taken here. For, this would require a measure of argumentation that is significantly beyond the scope and scale of the current project. Yet, I accept, and think that it is a good thing, that at least some of the advantages of this orientation will be made explicit, merely by delineating the terms of the current undertaking.

1.1 Basic Orientation

As stated in the introduction, this work is meant to help answer the foundational question of jurisprudential inquiry: namely, what is law? Responses to this query are not constituted by the identification of the rules or principles of some particular legal system, or the political position expressed by a government within such a set of standards. As Thomas Hobbes said, some four hundred years ago, the point is "not to shew what is Law here, and there…."[2] Rather, it is delineate the nature of this phenomenon as such, "as Plato, Aristotle, Cicero, and divers others have done, without taking upon them the profession of (it)".[3]

Now, the present discussion is meant to illuminate the analytical orientation of the current project. Yet, it does not explain very much to note that the central task of this project will be to attempt to explicate the nature of law. In fact, beginning with such a loose description of this project's theoretical direction does more to evoke a sense of the massive breadth of this field of study, and the diversity of approaches that could be taken up with regards to it, than to express where the current endeavor is actually headed. In order to overcome this vagueness it is helpful to respond to two particular questions. First, by what means is the following discussion of the nature of law to be realized? Second, and just as important, what are the criteria for assessing the success of such an enterprise?

1.2 Two Methods of Analysis

At this point, someone might find it tempting to think that the current discussion is headed towards making a mountain out of a molehill. After all – it might be suggested – isn't it simple common sense to think that if someone is interested in learning about the nature of a social phenomenon, then we should be trying to theoretically model those

[2] Thomas Hobbes, *Leviathan* (London: Penguin Books, 1985), ch. XXVI.
[3] Ibid.

points of practice and discourse that constitute it? And, if this is the case - they might continue - then all that really needs to be done, in order to explain the nature of law or legal standards, is to look to those aspects of human practice and discourse that are considered to be legal, or at least law related, and articulate their boundaries.

It is certainly true that most legal scholars accept that knowledge of, and reference to, the practices, beliefs, and attitudes of those persons who stand in relation to the law are an essential source of information. However, the argument put forward by our hypothetical interlocutor would overlook the fact that there are at least two different sorts of positions to choose from when determining how to treat such matters of social fact, within the context of a theoretical inquiry.

The first possibility is what will, hereinafter, be referred to as the catalogical approach. This sort of analysis is realized when the stated attitudes of a population, regarding some phenomenon, are identified and then arranged in a manner that is supposed to express the folk understanding of the subject being investigated. Insofar as this approach offers a sheer exhibition of the terms of discourse of a given population, it is promoted as offering theoretical models of a subject which are free from the threat of interpretive bias, except within the very limited tasks of authenticating and sorting the evidence.[4]

Within scholarship aimed at uncovering the nature of law, Brian Tamanaha's theory of "socio-legal positivism" stands out as the project that best instantiates the catalogical approach. In his words:

> Socio-legal positivism recognizes that law is a human social creation. Law is whatever we attach the label 'law' to. [This theory is] unflinchingly conventionalist in the identification of what law is. If law is attached by

[4] That said, there always seems to be quite a lot of theoretical room for a catalogical scholars' attitudes to creep into determinations of what exactly is to count as evidence and why it should do so. In this vein, Neil MacCormick once contended that the problem faced by all legal scholars, "is not whether to be realistic, but how, not whether to portray law as fact rather than fiction, but what counts as a fact, and what, therefore, as a factual portrayal of it". See his, "Law as Institutional Fact," *Law Quarterly Review* 90, (1974): 102-3.

> usage to more than one phenomenon, rather than picking one to serve as the standard by which to evaluate the others, socio-legal positivism will accept that there are different kinds or types of law, each with its own characteristic features.[5]

As such, this enterprise amounts to a detailed, but passive report of how the word 'law' is deployed within the context of social discourse.

This sort of position does have some prima facie appeal, especially insofar as it appears to theoretically honor the terms of a community's folk attitudes and discourse about its own practices. However, there is one glaring analytical cost associated with maintaining an approach that is as 'unflinchingly conventionalist' as this. This issue is rooted in the fact that, when one explores a community's existent understanding of a given social phenomenon, it is almost impossible to avoid exposing points of deep conflict, dissensus and confusion about the subject in question - a point that is particularly true with regard to the public understanding of law. The reason that this is a problem for catalogical inquiries is that such a passive approach to theorizing offers no way to remedy such points of evidential dissonance. Indeed, rather than moving to refine their model in order to overcome such tensions, catalogical scholars are forced to simply acknowledge such tensions within the theoretical representation of their subject of inquiry. As an example of this, note Tamanaha's response to the possibility of finding conflicting usages of the term "law", in the above quotation. His move is not to engage in any sort of analysis to assess even the mere possibility of identifying terms of acceptable or unacceptable understandings. Instead, he is forced to simply note the apparent inconsistency and incorporate it directly into his proposed model of the subject matter.[6]

There is a lesson to take from this. The catalogical approach to theorizing might provide an interested party with a platform from which to "spot patterns and relationships across contexts, [and] to observe large-scale or parallel developments" within a given population's understanding of a subject. However, it cannot bring clarity to those

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[5] Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 151-152.

[6] Ibid.

subjects that tend to stimulate theoretical inquiry in the first place; those that are puzzling and perplexing exactly because of their conflicting or inchoate popular understanding. To achieve theoretical resolution with regard to these sorts of phenomena, one needs to take a more creative approach towards their analysis: the philosophical.

Some scholars, such as Isaiah Berlin, have claimed that the task of philosophical inquiry:

> …is to extricate and bring to light the hidden categories and models in terms of which human beings think (that is their use of words, images and other symbols), to reveal what is obscure and contradictory in them, to discern the conflicts between them that prevent the construction of more adequate ways of organizing and describing and explaining experience…[7]

However, given the foregoing discussion, it seems that this description applies no less aptly to the project of catalogical theorizing.

What is distinct about the philosophers' task is that they attempt to move beyond the mere appreciation of what is unclear or incongruous in our understanding of the world. By taking a critical eye to what is generally understood about a given subject and what is normally meant when it is referenced in speech, they endeavor to provide a more finished delineation of a subject. Thereby, allowing us to "communicate effectively, avoid paradox and achieve general coherence" in our appreciation of the world.[8]

As Jules Coleman argues, within philosophical accounts of law, the popular or conventional understandings of this subject "serves to provide us, in a provisional and revisable way, with certain paradigm cases of law, as well as helping us to single out what features of law need to be explained. [It] enters not at the stage of providing the theory of the concept, but at the preliminary stage of providing the raw materials *about which* one is to theorize".[9] So, whereas, on the catalogical approach, a theorist is meant to keep

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[7] Isiah Berlin, "The Purpose of Philosophy," in Henry Hardy, ed., *Concepts and Categories: Philosophical Essays* (London: Pimlico, 1999), 10.

[8] Quentin Skinner, "The idea of negative liberty: philosophical and historical perspectives," Richard Rorty, ed., *Philosophy in History: Essays on the Historiography of Philosophy* (Cambridge: Cambridge University Press, 1984), 199 n. 21.

[9] Jules Coleman, *The Practice of Principle* (Oxford: Oxford University Press,

clear of augmenting any collected information; philosophical analysis requires one to rigorously investigate and develop the accepted understanding of a phenomenon, guided by the desire to wring lucidity from that evidential landscape. Within such work, a theoretical model is established, wherein the conventional conceptions of practice and discourse are recast within a novel, or at least more reasonably developed, account of the subject matter.[10]

It is this more involved sort of endeavor that will be embraced within the current work, as the means through which to contribute to the theoretical appreciation of the nature of law. With this stated, the answer to the first methodological question has been elucidated. The current undertaking accepts, as its analytic purview, the delineation of the nature of the law as such. Moreover, it will engage with that subject of inquiry on philosophical terms.

1.3 Standards of Success

It is now time to turn to the question of how to measure the success of an endeavor that purports to inform our understanding of the law. Given the foregoing discussion, this query can be more specifically understood as asking what the terms of success are for the philosophical analysis of law and legal practice.

Analytic Jurisprudence

One way of thinking about these conditions is suggested within the work of Wilfrid Waluchow. This scholar contends that the philosophical analysis of law is

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2001), 200.

[10] When the point is put this way, it is clear that catalogical projects and endeavors of philosophical inquiry are not antithetical to one another. In fact, any theorist engaged in the philosophical analysis of law would be well advised to investigate catalogical theories of that phenomenon. For, such works are apt to provide a sort of summary of the attitudes and discursive tendencies that are supposed to serve as part of the empirical grounds of their own projects.

properly pursued as a "descriptive-explanatory" undertaking. That is, just as one would provide an analysis of the phenomenon of promising, "by asking what it is necessarily or typically to engage in the social practice we call 'making a promise'", so too ought one to analyze the concept of law.[11] On this rendering, the philosopher is meant to offer a theoretical model capable of tracking the points of behavior and discourse that are popularly understood to constitute her subject. But, what is more, she must do so in a way that makes sense of these phenomena as a coherent whole.[12] Thus, with regard to Waluchow's example of "promising", the philosopher would have to account for the semantics of promise-making, while also delving into an explanation of how that content is made sensible as an act of normatively committing oneself to some specific course of action.[13]

When understood as a descriptive-explanatory endeavor, the philosophical analysis of law appears to provide scholars with a natural manner of assessing the success of any proposed theory. For, insofar as such undertakings are purported to be descriptive projects, one would think that their executors ought to aspire to accurately account for the contours of that phenomenon, as exhibited and recognized within social practice and discourse. And, insofar as these models are purported to be explanatory, it would seem to follow that their architects ought to develop accounts that reveal how it is that their subject can be understood to exist as a single, coherent phenomenon.[14] As such,

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[11] Wilfrid Waluchow, "The Many Faces of Legal Positivism," *University of Toronto Law Journal* 48 (1998): 392.

[12] In cases where the unity of a subject of interest turns out to be a façade, the theorist bears the burden of demonstrating this underlying reality.

[13] This discussion is a very modest expansion of Waluchow's own delineation provided within "The Many Faces of Legal Positivism". For a different conception of the "descriptive-explanatory" project, see Stephen Perry, "Methodological Positivism" in Jules Coleman, ed., *Hart's Postscript: Essays on the Postscript to the 'Concept of Law'* (Oxford: Oxford University Press, 2001).

[14] The notion of coherence is generally thought to be quite a rich theoretical desideratum. For an analysis to this end see, Robert Alexy & Aleksander Peczen, "The Concept of Coherence and Its Significance for Discursive Rationality," *Ratio Juris* 3 (1990): 130-47.

descriptive-explanatory accounts of law are geared towards satisfying the classic analytical criteria of theoretical success: accuracy and coherence.[15]

Now there is nothing to say that a theorist will be able to perfectly model all of the features and aspects of a social practice while also being able to sustain the coherence of that representation. In fact, due to the sheer complexity of our social practices, and especially the law, such an achievement is a dubious proposition at best. However, whenever a theorist attempts to enhance the philosophical understanding of the law by offering a descriptive-explanatory model that is primarily responsive to the epistemological desiderata of accuracy and coherence, they are understood to be participating in the project of analytic jurisprudence.[16]

Alternative Criteria

Although the terms of analytic jurisprudence are compatible with the philosophical analysis of law, and although many scholars support this kind of project, there are some who think that it is decidedly wrongheaded. For, this approach only demands that the myriad elements of law's institutional practice and discourse be

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[15] It is well worth nothing that these are not the *only* conditions of success within analytic jurisprudence. For instance, clarity and parsimony are also considered to be integral to the evaluation of a given legal theory. This said, accuracy and coherence are widely held to be the fundamental aspirations of philosophical analysis. For a supporting discussion, see Thomas Kuhn, *The Essential Tension* (Chicago: University of Chicago Press, 1977).

[16] In a slightly different rendering, Julie Dickson, following Joseph Raz, describes analytic jurisprudence as being:

> …concerned with explaining the nature of law by attempting to isolate and explain those features which make law into what it is. A successful theory of law of this type is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law. Points (1) and (2) are intimately linked: a theory's ability to explain adequately the nature of law is dependent upon its at least consisting of necessarily true propositions.

See, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001), 17-18.

identified, and then arranged and explained within a framework designed to wring coherence from that evidential mass. But surely, certain dissidents argue, more must be required of theoretical constructions that are supposed to represent, and may well have an impact upon, the very important elements of human activity that fall under the heading 'law'. With this idea in mind, a number of theorists have suggested that additional or alternative standards of success should be recognized with regard to that phenomenon's philosophical analysis. In what follows, the views of two such scholars will be briefly considered.

First off, there is the position espoused by Ronald Dworkin. This scholar grounds a number of meta-theoretical suggestions in the idea that a human practice, such as the law, "does not simply exist but has some value…it serves some interest or purpose or enforces some principle".[17] Accordingly, he argues, philosophers of law ought to "try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice".[18] Thus, according to Dworkin, while there is nothing inherently problematic about accurately and coherently elucidating the way that the law is generally construed, this approach may need to be "modified or qualified", in order to insure that the depiction of that phenomenon ends up suggesting that it can actually realize its ostensible social rationale.[19] As such, Dworkin understands himself to have offered an "interpretive" argument for augmenting the terms of analytic jurisprudence.[20]

Second, there is David Dyzenhaus, who offers a straightforwardly moral argument to support a move away from complete adherence to the analytic standards of accuracy and coherence. This line of reasoning is motivated by the fact that theories of law tend to inform legal decisions. Indeed, Dyzenhaus argues, "we cannot ignore the possibility that judges will differ in the adjudication of hard cases in accordance with their

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[17] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 47.

[18] Ibid., 90.

[19] Ibid., 47.

[20] Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), ch. 6,7.

different conceptions of law and the rule of law".[21] Thus, on the understanding that we want governmental administrators to make good moral decisions, it seems clear that we should structure our legal theories to lead them to such results. As such, Dyzenhaus has provided an instrumentalist argument for demanding that a theory of law's responsiveness to the moral implications of its juridical uptake be counted when evaluating its worth.[22]

If the arguments put forward by Dworkin and Dyzenhaus are sound, then they reveal two different ways in which works of analytic jurisprudence fail to respect and respond to the fact that law is realized within the domain of human activity.[23] For, it is true that those who adopt this philosophical orientation are unwilling to modify or qualify their theoretical models in order to insure that the law will be shown to be capable of realizing some purported social rationale. And, neither are they interested in adjusting their accounts in order to covertly manipulate the institutional practice of law towards better moral outcomes. However, this does not mean that they should be thought to be offering anything like a "taxonomic" understanding of law.[24] For, there is a very obvious

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[21] David Dyzenhaus, *Hard Cases in Wicked Legal Systems* (Oxford: Clarendon Press, 1991), 31.

[22] This sort of argument commands uniquely powerful rhetorical force and, as such, pops up in the work of a wide variety of authors. Indeed, even Dworkin, in some of his more rhetorical moments, appears to rely on its appeal. For example, at a talk given to law students, he once contended that his conception of law should be preferred because it allows us to:

> …march together so that the settlements of principle we reach from time to time, as plateaus for farther campaigns, extend to everyone. We leave no wounded behind, no abandoned minorities of race or gender or sexual disposition, even when bringing them along delays the gains of others.

See, "Law's Ambitions for Itself," *Virginia Law Review* 71 no. 2. (1985), 187.

[23] This said, there is very good reason to be skeptical of the soundness of both of these positions. For, there are a number of important philosophical issues dogging each of them. For a critical synopsis of Dworkin's approach see, Brian Leiter, "The End of Empire: Dworkin and Jurisprudence in the 21st Century," *Rutgers Law Journal*, no. 36 (2004): 165-181. For a similar treatment of Dyzenhaus' project, see Roger Shiner, "David Dyzenhaus and the Holy Grail," *Ratio Juris* 7, no.1 (1994): 56-71.

[24] See, Dworkin *Justice in Robes* (Cambridge MA, The Belknap Press, 2006), ch. 8.

way that endeavors in analytic jurisprudence actually do defer to the human reality of their subject.

Simply put, this approach to legal theory seeks to tell the story of law in a way that prioritizes the attitudes and beliefs of those who actually realize and experience it. For, unlike the work of Dworkin or Dyzenhaus, the analytic project does not move to augment or adjust that depiction at the behest of any supplementary moral or philosophical considerations.[25] As such, it breathes theoretical life into our shared experience of that phenomenon, in a way that allows its workings and its boundaries to be explored, considered, and critiqued on its own terms.[26] Consequently, although there may be good reasons to adopt a more robust understanding of the terms of philosophical success, there will always be a clear warrant for adopting the original criteria of analytic jurisprudence. And, it is upon this license that the present essay will rely.[27]

With this last point in hand the elucidation of the basic methodological orientation of the current undertaking is complete. To summarize: this project is aimed at contributing to the philosophical articulation of the nature of law as such. Furthermore, it will do so via the terms of analytic jurisprudence. Now, admittedly, no systematic

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[25] Obviously, this claim means to except the criteria of coherence, which must be accommodated if one is interested in telling a comprehensible theoretical story of any sort.

[26] This construal of the role of analytic jurisprudence has serious implications for certain ongoing debates within legal theory. For example, Liam Murphy has argued that if two analytic theories were to account for the law with equal accuracy and coherence, the proper way to resolve that stalemate would be to defer to moral considerations about which conception would produce better results if disseminated. But, with an eye to the foregoing discussion, it is clear that this move would actually amount to the abdication of the analytic project. See his, "The Political Question of the Concept of Law," in Jules L. Coleman, ed., *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford: Oxford University Press, 2001).

[27] It must be admitted that there are those who are skeptical of this meta-theoretical justification. For example, Brian Leiter has moved to question its plausibility within his, *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007). While, I believe that his position is worth engaging, an adequate response is simply not possible here due to space limitations. However, for another scholar's response to some of his arguments, see Julie Dickson, "Methodology in Jurisprudence: A Critical Survey," *Legal Theory* 10 (2004): 117-56.

attempt has been made to supply a systematic justification of this orientation. However, I believe that enough has been explicated to provide a basic appreciation of the nature and benefits of the kind of undertaking that is to follow.

1.4 Theory

Despite the work already done to elucidate the methodological commitments of the current endeavor, the stage has not yet been adequately set. For, no philosophical undertaking takes place in a theoretical void. Rather, such endeavors exist as contributions to an ongoing tradition of scholarship regarding their subject matter. What is more, this relationship is a theoretically potent one. Which is to say that emergent models are inevitably informed by what is seen to be successful in preceding attempts, and stimulated by what is deemed problematic. As such, this chapter will now move to provide a brief, and somewhat simplified, historical overview of some of the more important members of the relevant theoretical domain, in order to ensure an appreciation of the context and intended contribution of the current project. This exegetical discussion will begin with a description of certain parts of the broad grouping of theories commonly referred to as Natural Law.

Natural Law[28]

This position emerged as the primordial theory of law, coming into its own at the height of ancient Greek thought, through the work of Plato[29], and then being developed

[28] In the historical discussion to follow, I do not mean to provide a comprehensive summary of any given position. Rather, the point is to highlight a few key theoretical features of these theories. For a more detailed, though still brief, account of the classical natural law position, see John Finnis "Natural Law: The Classical Tradition," in Jules Coleman & Scott Shapiro, ed., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 1–60. For an overview of contemporary positions of this camp, see Brian Bix's article in the same work.

over the following centuries, before fully blossoming within the scholarship of Thomas Aquinas[30]. At these earlier stages in the history of legal study, the work of scholars with a philosophical bent was rarely, if ever, focused upon establishing a theoretical framework to capture the nature of a single, independent, object of interest. Thus, rather than attempting to study the phenomenon of law solely in terms of the practice and discourse with which it is customarily associated, natural lawyers often appear to take a vastly different approach to its analysis. That is, they identify the contours of their subject through reference to the surrounding theoretical landscape: physical, metaphysical, or both. As a seminal example of this scholastic tendency, consider that Plato's understanding of law was informed by his understanding of the social conditions that must exist for human beings to be able to accommodate the demands of virtue.[31]

An awareness of this analytical process is integral to understanding the defining characteristic of this theoretical grouping. For, as in the case of Plato, when natural lawyers speak to the proper understanding of law they inevitably do so via reference to a

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[29] Plato's most famous political work, *Republic*, focuses upon the idea of natural justice, rather than the notion of natural law. However, he explicitly engages with the latter topic within the works *Laws* and *Minos.* See*, The Dialogues of Plato*. trans. Benjamin Jowett (New York: Random House, 1937).

[30] Thomas Aquinas, *Treatise on Law: Summa Theologica, Questions 90-97* (New York: Regnery Gateway, 1996).

[31] In his own words, Plato states that:

> …the virtue of human life depends on the due regulation of three wants or desires. The first is the desire of meant, the second of drink; these begin with birth, and make us disobedient to any voice other than that of pleasure. The third and fiercest and greatest need is felt latest; this is love, which is a madness setting men's whole nature on fire. These three disorders of mankind we must endeavor to restrain by three mighty influences—feat, and law, and reason, which, with the aid of the Muses and the Gods of contests, may extinguish our lusts.

See *Laws*, 542. For the specifics of his account, see *Republic* for his explication of the law's role as mediator between human practice and the rational order of the universe. Also, see *Statesman* and *Laws* for a more precise delineation of the standards that must be imposed upon human communities in order for it to realize that function.

naturally inherent moral framework.[32] Thus, for such scholars, the terms of an innate moral schema is a part of the source materials by which the concept of law is ultimately informed.[33]

The result of this strategy is that natural lawyers find themselves saddled with a particular substantive challenge. To appreciate this conundrum, consider that one of the seemingly self-evident features of law is that it is, at least partially, constituted by the activities of those institutions that actually engage in the practice of political governance. What is more, it is an inescapable fact that such agencies must be organized according to their own normative framework. Thus, there is an onus upon natural lawyers to explicate the kind of relationship that exists between the normative domain of inherent morality, and that of the institutions of de facto social governance.

Within the literature, this burden tends to be satisfied in one of two ways. On the one hand, some scholars, such as Aristotle and Cicero[34], have cast their understanding of

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[32] This argumentative tendency was prevalent in classical accounts, such as that put forth by Aquinas, and continues to exist within contemporary scholarship, within the work of authors such as John Finnis and Mark Murphy. See, Finnis' *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), and Murphy's, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006).

[33] This fact serves to explain why such theories have come to be known as "Natural Law" accounts. For, within this position, the terms of law are conceived of as being a function of the natural world, as opposed to merely being a matter of human artifice. As Plato puts the point, individuals "…ought to support the law and also art, and acknowledge that both alike *exist by nature, and no less than nature…*". *Laws*, 632. My emphasis.

[34] Aristotle's stance on the natural law as rhetoric is said to be implicit in the structure of his work, since he raises the idea within the work *On Rhetoric: A Theory of Civic Discourse,* trans., George Kennedy (Oxford: Oxford University Press, 1991). For a contemporary commentary to this effect, see Max Salomon Shellens, "Aristotle on Natural Law," *Natural Law Forumi,* 4, no. 1, (1959): 72–100. Whereas, Cicero explicitly states:

> The laws of nature themselves are less inquired into in a controversy of this sort, because *they have no particular connexion with the civil law* of which we are speaking, and also, because they are somewhat remote from ordinary understandings. Still it is often desirable to introduce them for the

the moral terms of natural law as being a kind of rhetorical device. Within such accounts, the terms of morality act as a source of reasons to challenge the acceptability of the institutionally adopted standards of governance, without being determinative of the actual legal status of those norms.

On the other hand, a much more famous construal of this relationship is expressed in the following quotation from the famous English jurist, Sir William Blackstone. He writes:

> This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: No human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately from this origin.[35]

Herein, the natural moral order identifies or entails normative conditions of legally legitimate practice. On this understanding, the rules that guide the institutional practice of governance can always be said to exist as "human" or "positive" laws.[36] However, these standards only achieve full legal standing when they satisfy the terms and conditions delineated within the inherent moral order of the world.[37] When they do not, said Aquinas, what is being dealt with, "is not a law, absolutely speaking, but rather a perversion of law".[38] They are "defective" legal standards.[39] It is in this way that most

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> purpose of some comparison, or with a view to add dignity to the discussion.

"On Invention", *The Orations of Marcus Tullius Cicero* trans. C. D. Yonge, (London: George Bell & Sons, 1888). My emphasis.

[35] William Blackstone, *Commentaries on the Law of England*, vol. 1. (Chicago: University of Chicago Press: 1979) at 41.

[36] This is the more prevalent understanding. However, there certain authors who will go so far as to maintain that in certain extreme cases, what are ostensibly legal standards ought to be understood as being completely voided of that status. See, for example, Robert Alexy, *The Argument from Injustice*: *A Reply to Legal Positivism* (Oxford: Clarendon Press, 2002), 28-35; 40-68.

[37] See, for example, Finnis, *Natural Law Natural Right*, 279.

[38] Aquinas, *Summa Theologica,* I-II,92, i.

contemporary natural lawyers construe the relationship between the two normative domains. That is, as one where compatibility with the requirements of the natural moral order is a condition for fully realized legal practice - a condition which is established outside of the realm of human artifice, but which is determinative of the legal standing of the rules and standards established therein.

Although theories of this latter sort were often intricately constructed and compellingly argued for, these more robust versions of the natural law position eventually inspired a series of reactionary developments within legal philosophy. In what follows, the central complaint with such positions will be identified and briefly explained. However, that discussion will really just be a jumping off point for an elucidation of the theoretical landmarks dotting the development of the most widely accepted theory of law today: legal positivism.

Legal Positivism

This branch of analytic jurisprudence first emerged as an attempt to introduce the empirical orientation of scientific inquiry into the domain of legal scholarship. Developed in Britain, this brand of legal philosophy found its roots within the work of Thomas Hobbes and David Hume, but was given its first recognizable delineation by Jeremy Bentham.[40] In trying to approach the study of law along empiricist lines, Bentham struck out against what he saw as an analytically obscuring reliance upon "fictitious entities" within the understanding and practice of law.[41] To this end he railed against theories of natural law by harping upon the commonplace idea that law was primarily a social phenomenon. In his words: "from *real* laws come *real* rights; but from *imaginary* laws, from laws of nature, fancied and invented by poets, rhetoricians, and

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[39] Murphy, *Natural Law in Jurisprudence and Politics*, 10.

[40] See, Jeremy Bentham, *Introduction to the Principles of Morality and Legislation* (New York: Columbia University Press, 1945), and *Of Laws in General*, H.L.A. Hart, ed., (London: Athlone Press 1970).

[41] Bentham, *Introduction to the Principles of Morality and Legislation*, 105.

dealers in moral and intellectual poisons, come *imaginary* rights, a bastard brood of monsters."[42]

This scientific-philosophical project was more fully extrapolated and popularized by John Austin, whose work became the theoretical rallying point for those who shared Bentham's inclinations and trepidations. This scholastic prominence was, in no small part, due to Austin's ability to speak to the empiricist attitude from within a succinct and captivating argument aimed at the more robust theories of natural law discussed above.[43] His criticism, through embryonic, has come to be accepted in some form by every positivist scholar since - and it goes something like the following:

> Some theorists of natural law assert that it is a criterion of full legal standing that socially established institutional standards comport with a set of objective moral norms that are in themselves, or in their connection to the terms of law, highly dubitable.[44] The result of this theoretical

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[42] Jeremy Bentham, "Anarchical Fallacies," vol. 2, John Bowring, ed., *The Works of Jeremy Bentham* (London: Simkin, Marshall and Co., 1843), 523. Emphasis in original. By questioning the notion of an inherent moral foundation of law, Bentham was able to open legal institutions to criticism. As John Stuart Mill famously stated:

> …until Bentham spoke out, those who found our institutions unsuited to them did not dare to say so, did not dare consciously to think so; they had never heard the excellence of those institutions questioned by cultivated men, by men of acknowledged intellect…

In, "Bentham", John M. Robson, ed., *The Collected Works of John Stuart Mill, Volume X - Essays on Ethics, Religion, and Society* (London: Routledge, 1985).

[43] John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1954), 184-187.

[44] His clearest expression of this point is reserved for scholars of international law, whom he claims:

> …have confounded the rules which actually obtain among civilized nations in their mutual intercourse, with their own vague conceptions of international morality *as it ought to be*, with that indeterminate something which they conceived it would be, if it conformed to that indeterminate something which they call the law of nature.

Ibid., 187. Emphasis in original.

> commitment is that these scholars come to model the law in a way that allows for ascriptions of legal status to significantly deviate from the content of actual normative frameworks of institutional governance. As such, these philosophers provide an unjustifiably distorted account of the nature and terms of law.[45]

Or, with Bentham-atic flourish:

> Natural lawyers elevate a scholarly fiction to a position of ascendancy over our understanding of the world, thereby corrupting our ability to appreciate the social reality of law and legal practice. To this extent, they "place nonsense upon stilts".[46]

With this line of reasoning firmly in mind, early legal positivists sought to construct a more scientifically robust account of the nature of law. And it is towards this end that Austin famously suggested the "simple and glaring" central tenet, or "dogma", of legal positivism. That:

> (t)he existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an

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[45] Austin's original formulation of this argument is as follows:

> Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.

Ibid., 185.

[46] Bentham, "Anarchical Fallacies", 501.

> assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.[47]

So, where robust theories of natural law hold that the legal standing of a norm or system of norms can be effected solely by moral considerations, positivists have historically asserted that at bottom the legal status of a given standard must be established by reference to social facts.[48] Though, as Les Green points out:

> The positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral…[It only entails that,] (w)hether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law.

Now, despite the shared intention among legal positivists to offer accurate theoretical representations of the "social reality" of law and legal practice, there have been a number of different ways in which they have moved to model their subject. For, as a structurally, functionally, and normatively complex object, there are many different aspects of the law's social reality to investigate, and better and worse ways to go about doing so.[49] In what follows, a number of disparate positivist theories will be briefly explored, in order to provide points of reference for the developments to be suggested later in this work.

To begin with, it is important to reiterate that both Austin and Bentham's accounts of law emerged as a reaction to, and rejection of, the natural lawyers' inclusion of extra-social conditions on the content of law. However, it is just as important to note that neither scholar took issue with the idea that legal dictates are possessed of, or apt to, some

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[47] Austin, *Province of Jurisprudence Determined,* 184.

[48] Leslie Green, "Legal Positivism", The Stanford Encyclopedia of Philosophy, E. Zalta, ed. http://plato.stanford.edu/entries/legal-positivism/ (accessed November 24, 2007).

[49] Furthermore, insofar as they emerge from within a wide variety of chronological, geographical, and cultural settings, these theories have been created against a multitude of different theoretical backdrops.

sort of native authority. Indeed they took great pains to incorporate that idea within their respective accounts. On this basis, their theories came to be formed around the concept of the legal sovereign: an agent that is obeyed by the bulk of a society, but that does not defer to any other agent.[50] More specifically, they portrayed the law as a system of coercive political governance, oriented by the commands of that sovereign. Legal standards, on this account, are nothing more than the prescriptions issued by the sovereign; and the inherent authority of legal norms is identified with that agent's capacity to affect its own desires via the threat of sanction.[51] In this way, Austin and Bentham understood themselves to have found a way to avoid the pitfalls of natural lawyers' theoretical reliance upon morality, while still respecting the idea that the law is, in essence, an authoritative exercise.

Despite some strong initial appeal, scholars in the field eventually came to the conclusion that these "command theories" lead to some intractable conceptual problems.[52] For, by modeling every legal action and relationship with regard to the paradigm of sovereign commands, these accounts fail to accurately reflect the nature and extent of the legal empowerment of individuals; particularly with regard to the creation and dissolution of legal relationships.[53] Consider, for example, how awkward it is to suggest that all civil contracts or marriages are properly understood as being legally valid only insofar as they have been ordered by a threatening sovereign, or that agent's appointed representatives.

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[50] See Bentham, "Of Laws in General", 1, and Austin, *Province of Jurisprudence Determined*, 9. Also, to avoid portraying these theories in a ridiculous manner, it is worth noting that for Austin the sovereign agent did not have to be constituted by a single individual, but could also be comprised of a group or even the entire body politic. See, *Province of Jurisprudence Determined,* 217. Bentham's position is even more complex, in that it allows for multiple and/or partial sovereignty. See, "Of Laws in General" at 18, n. 6.

[51] See, Bentham, "Of Laws in General" 133-141.

[52] For a detailed discussion on this point see W. Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in 19th Century England* (London: Continuum Press, 2005).

[53] For the most well regarded criticism of Austin on these lines, see H.L.A. Hart's *The Concept of Law*, 2nd Edn. (Oxford: Clarendon Press, 1994), Ch. 1.

Out of a strong sense of the descriptive problems with command theories and natural law accounts, another group of scholars came to suggest an alternative to these conceptions of law. The Scandinavian Legal Realists[54], as adherents of this camp became known, asserted that all "…fundamental legal notions must be interpreted as conceptions of social reality, the behavior of man in society, *and as nothing else*."[55] Accordingly, they curtailed the deployment of conceptual abstractions (such as the notion of a "sovereign") within their theories. Instead, they chose to model the law solely in terms of the psychological states and historical behaviors of persons.[56] The result of taking this robustly social-scientific approach to legal theory was that legal standards came to be portrayed as "independent imperatives": political prescriptions that enough governmental administrators are motivated to implement, so as to be made institutionally efficacious.[57]

From the standpoint of analytic jurisprudence, there are some significant consequences that arise when the law is modeled in this way. First, insofar as this manner of construing the law avoids relying upon morality or sovereignty as conditions of

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[54] Two points need to be made here. First, within contemporary scholarship this group is often distinguished from legal positivists. However, insofar as they adhered to the central tenet of positivism, and insofar as their work self-identifies with that theoretical lineage, I see no reason withhold the title. Indeed, 'realists' themselves can be seen to talk of their moniker as more of a 'battle cry', than as a statement of alterity from the positivist camp. See M.D.A. Freeman "The Scandinavian Realists" in, M.D.A. Freeman, ed., *Lloyd's Introduction to Jurisprudence*, 8th edn., (London: Sweet and Maxwell, 2008) at 1138. Second, it is important to distinguish between this camp, and the American Legal Realists. For, the latter group is not primarily interested in unpacking the philosophical understanding of the nature of law, per se. Rather, it is more specifically dedicated to arguing that a "careful consideration of how courts *really* decide cases reveals that they are not primarily motivated by the terms of law, but (roughly speaking) by what would be "fair", given the facts of the case." See Brian Leiter's "American Legal Realism," in W. Edmundson and M. Golding, eds., *The Blackwell Guide to the Philosophy of Law*. (Oxford: Blackwell Publishing, 2003).

[55] Alf Ross, *On Law and Justice*, (New Jersey: The Lawbook Exchange, 2004) At *ix*. My emphasis.

[56] See, for example, ibid. at 52-59, and Karl Olivecrona, *Law as Fact*, (London: Humphrey Millford: London, 1939) at 151-156.

[57] Though this phrase is more frequently associated with the work of Karl Olivecrona, the evocativeness of its language is very helpful in underlining upcoming points about the general nature of this undertaking.

legality, it does manage to avoid some of the theoretical problems that plague both the natural law and command theories.[58] In short, Realists can attribute full legal status to any standard that achieves institutional uptake, and they can do so without depending upon descriptively misleading theoretical constructs such as a legal sovereign. However, by construing legal rules simply as prescriptions that are "absorbed by the mind" of enough persons to achieve governmental effect, Realists rejected the idea that the legal status of these policies depends upon their having been sanctioned within any sort of normative hierarchy. That is, when the realists moved to reduce legal standards solely to matters of social fact, they abandoned any attempt to portray them as having been authoritatively established.[59]

The problem with this move is twofold. First off, the idea that legal standards must be systemically authorized, rather than naturally emergent, is so entrenched within the popular understanding of this subject, that it can be considered a truism. And, to proffer a model of law that is conceptually irreconcilable with such a widespread belief is to draw the adequacy of one's account into immediate question.[60] Secondly, though in something of the same vein, H.L.A. Hart famously pointed out that the Realist approach is in tension with the discourse actually at play within legal practice. More specifically, when legal officials refer to the validity of a legal norm, they are not making a claim

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[58] It's worth nothing here that the Realists proposed a much more robust set of ontological arguments against the terms of natural law than Austin had. In this vein, the progenitor of the Scandinavian movement, Axel Hagerstrom, asserted that "the supposed supernatural power or obligation, as the case may be, is a logical absurdity." See his, *Inquiries into the Nature of Law and Morals*, trans. C. D. Broad (Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala, 1953), 324.

[59] See Olivecrona, *Law as Fact*, at 42-43 and 151-156, and Ross, *On Law and Justice*, 34-38.

[60] On this methodological point, see Scott Shapiro, *Legality* (Cambridge: Belknapp Press, 2010) at 14-16. Also, it should be noted that later Realists felt this pressure and tried to offer something of a concession to this point. Alf Ross, for example, argued that while law was not "in fact" binding, the descriptor "law" is normally reserved for institutionally efficacious norms that are felt to be obligatory, rather than for matters of purely personal interest. See, *On Law and Justice,* 53.

about the psychological or behavioral proclivities of a population. Which is to say that a judge:

> …is not engaged in predicting his own or others' behavior or feelings…'This is a valid rule or law' said by a judge is an act of recognition; in saying it he recognizes the rule in question as one satisfying certain accepted criteria for admission as a rule of the system and so as a legal standard of behavior.[61]

Given that the Realist position was proffered as a descriptively advantageous alternative to command theories and the position of natural law, these problems bring into question whether its benefits aren't overmatched by its costs.[62]

If the soundness of the above arguments were to be granted, then it appears that legal scholarship in general, and legal positivism in particular, have historically faced a theoretical dilemma. On the one hand, accounts of law that rely upon the idea of independent imperatives necessarily run afoul of the descriptive need to cast legal standards as being authoritatively established. While, on the other hand, it is far from obvious how to go about construing legal norms as dependent imperatives in a way that allows one's account to accurately represent the legal standing of a polity's institutional governance. It is this dilemma that has served to push and prod legal theory into its contemporary form.

The first successful attempt to break legal positivism out of this predicament was proffered by Hans Kelsen. His theory is so unique within the history of legal scholarship that in order to properly convey its character it is helpful to use the Realist position as a foil. Since, where authors such as Alf Ross and Karl Olivecrona sought to naturalize jurisprudence, Kelsen meant to emancipate it from the bonds of the social sciences

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[61] H.L.A. Hart, "Scandinavian Realism" in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) at 165. Also see his expanded arguments on this point in *Concept of Law,* ch. 7.

[62] Within contemporary legal theory, these descriptive issues have been given so much credence that Scandinavian Realism has become relegated to "the museums of jurisprudential archaeology". See Frederick Schauer, "Legal Positivism as Legal Information," *Cornell Law Review* 81 (1996-1997): 1081.

altogether.[63] The motivation for this approach was grounded in the observation that legal practice is based around governmental prescriptions. For, Kelsen argued, given that the law takes the form of "statements about what ought to be", a plausible theory must not treat that subject as being comprised of "statements about what is". [64] As such, he rejected the Realists' move to describe legal rules as those governmental policies that "are effectively followed, and followed because they are experienced and felt to be socially binding."[65] Rather, he sought to portray such standards as "norms" – as governmental prescriptions that have been authorized by a socially reified normative framework.[66] Consequently, where the Realists identified standards of law via reference to bare facts of human behavior and psychology, Kelsen identified them through an interpretive procedure that referenced the normative hierarchy espoused by a particular legal system.

Keenly aware that some scholars might consider his work to be overly-abstract, Kelsen took care to reassure his readers that he had not abandoned the positivists' scientific approach to legal theory. To this end, he asserted that his,

> …analytical description of positive law is, however, no less empirical than natural science restricted to a material given by experience. A theory of law loses its empirical character and becomes metaphysical only if it goes beyond positive law and makes statements about some presumed natural law.[67]

So, even though Kelsen was much more explicit about the interpretive dimensions of his theory than positivists traditionally had been, he did not mean to waver from providing a

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[63] This methodological commitment, along with his positivist rejection of incorporating the terms of morality into his model of law, allowed Kelsen to promote his account as a "Pure Theory of Law". See Hans Kelsen, *Pure Theory of Law,* trans. Max Knight (New Jersey: Lawbook Exchange, 2009), 1.

[64] Hans Kelsen, *General Theory of Law and State,* trans. A. Wedberg (New York: Russell and Russell, 1961), 162.

[65] Ross, *On Law and Justice*, 17.

[66] For the specifics of this complex standpoint, see Kelsen, *General Theory,* ch. 12, and Kelsen, *Pure Theory*, ch. 5.

[67] Kelsen, *General Theory,*163.

model whose attributions of legal status would cater to the de facto terms of law's institutional practice.

In order to get his account off the ground, Kelsen relied on a nuanced maneuver within his delineation of the grounds of legal normativity. As was already noted, on his understanding, a governmental prescription must be interpretable as being authorized within a broader system of legal standards, in order to be counted as a law. According to Kelsen, this meant that it must be sanctioned within a hierarchical normative structure.[68] But, what is more, he thought that such a hierarchical structure can only normatively sanction a standard if it is, itself, rooted in some font of authority.[69] Now, it has already been seen that when natural lawyers and command theorists accounted for the normativity of legal standards, they did so through reference to some specific account of the nature of the law's authority.[70] Kelsen, however, did not follow their lead. Instead, he "presupposed" the existence of the law's normativity.[71] That is, he set out to model the law as if it were normatively grounded. This postulation was represented within his theory as a hypothetical "basic norm" or "grundnorm", which acts as a theoretical placeholder for the ultimate source of law's normativity.[72] In this way, he suggested a model of law that interpreted the standards of institutionalized governance as dependent imperatives, by modeling them into a normative hierarchy that terminated in the grundnorm.[73]

The upshot of this maneuver is that Kelsen was able to avoid relying upon a substantive conception of authority that might preclude some ostensibly binding governmental standards from being interpreted as having normative, and hence legal, standing.[74] Rather, he was able to stipulate that the grundnorm consists of the

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[68] Kelsen, *Pure Theory,* 221.

[69] Ibid. at 198.

[70] Natural lawyers defer to the terms of morality, and command-theorists to the capacity of the sovereign agent to affect its sanctions.

[71] Ibid. at 201-205.

[72] Ibid. at 8.

[73] Ibid. at 205-208, and 221-222.

[74] Such as can occur within certain understandings of natural law theory.

fundamental imperative that officials "ought to behave as the constitution prescribes"; that all institutionally reified policies ought to be followed, no matter their content.[75] Thus, while Kelsen did not incorporate a substantive account of law's authority, he contended that he had provided for an "epistemological" one - insofar as the basic norm allowed him to normatively map the empirical boundaries of the official practice of institutionalized government.[76]

In this way, he offered a theory that speaks to the legal philosophers' dilemma, noted above. For, on the one hand, his model appears able to account for the legality of any instance or aspect of officially practiced governance of a society. While, on the other, it manages to make "explicit what all jurists, mostly unconsciously, assume when they consider positive law as a system of valid norms and not only complex fact".[77] That is, it casts all standards of law as being authoritatively established, and it does so in a way that is not based around the obscuring descriptive paradigm such as those suggested by natural law or command theory.

Now, while it is clear that there are substantial benefits that follow from the adoption of this theoretical approach, there are also a number of problems that are associated with it. The first issue of note regards the fact that Kelsen's understanding of law was proffered as a means of explaining the nature of institutionalized governance, "to the extent that it is determined by legal norms as condition or consequence".[78] The problem here is that no matter how effective Kelsen's epistemological approach is at providing a normative interpretation of legal practice, it explicitly relies upon a piece of theoretical fiction – the grundnorm – in order to do so. As such, even though his work ostensibly treats the law as being comprised of dependent imperatives, it ultimately refrains from offering a substantive account of just how this is so.[79] Thus, Kelsen ended

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[75] Kelsen, *General Theory,* 202.
[76] Kelsen, *Pure Theory,* 202.
[77] Kelsen, *General Theory*, 116.
[78] Kelsen, *Pure Theory,*70.
[79] More specifically, Kelsen argued that without relying upon some self-validating source, "like God or nature", any attempt to identify the grounds of legal normativity will inevitably devolve into an infinite regress. Thus, he suggested that if one wishes to

up leaving the door open to the accusation that he had only managed to solve the legal scholars' dilemma by sidestepping its second prong: the need to explain how it is that legal standards actually are authoritatively established within the institutional realization of law.[80]

A second concern with Kelsen's work regards the narrowness of his proposed understanding of law. For, by attempting to "purify" his model of law of any social-scientific considerations, he ends up focusing his analysis solely upon the normative aspect of law's political reality. Now, certainly, there is a great deal to be learned by analyzing "the specific meaning of legal rules, which are created and applied by the organs of the legal community, the sense with which these rules are directed to the individuals whose behavior they regulate."[81] However, unless there is no other option, it is difficult to see why this should be done to the exclusion of theoretically attending to the social circumstances that give rise to such abstract considerations. After all, given that the law is a phenomenon that straddles the ontological domains of social facts and norms, one would think that philosophers ought to model this subject in a way that gives credence to its multifarious nature. But, in suggesting a purely "normative jurisprudence", Kelsen ends up abdicating any attempt to realize a holistic understanding of the nature of law.[82]

With these criticisms on display, it is clear that while Kelsen managed to offer a solution to the legal philosophers' dilemma, he did so in a way that is analytically sub-

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pursue legal theory free of such a "metaphysical hypothesis", one must presuppose the basic norm. See, Kelsen, *Pure Theory,* 201-205.

[80] In this vein, Andrei Marmor once accused Kelsen of deploying the grundnorm as a "red herring". See, "Pure Theory of Law," Stanford Encyclopedia of Philosophy. http://plato.stanford.edu/entries/ lawphil-theory/ (accessed October, 13, 2008)

[81] Kelsen, *General Theory*, 164.

[82] Though Kelsen's use of the term "normative jurisprudence" is evocative of his position, it is also somewhat idiosyncratic. Within contemporary literature this term tends to refer to those theories that are grounded in the "material features of law or to the substantive value of living under law". See, Jules Coleman, "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence," *Oxford Journal of Legal Studies* 27 (2007): 581.

optimal. And, it was with an eye to this state of affairs that another scholar, H.L.A. Hart, was able to state that there remained:

> …a standing need for a form of legal theory or jurisprudence that is descriptive and general in scope, the perspective of which…is of a form of social institution with a normative aspect, which in its recurrence in different societies and periods exhibits many common features of form, structure, and content.[83]

With this mission in mind, Hart set out to construct a theoretical model of law that could overcome the looming philosophers' dilemma without invoking descriptive fictions, and which could transcend the divide between sociological and normative accounts of its subject.

In order realize this end, Hart developed a theory that was based around the idea of law as a system of social rules. On his understanding, such rules exist when persons adopt:

> … a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified…[84]

Thus, within this account, legality is not hypothetically imputed to the terms of institutional governance, as per Kelsen. Rather, it is identified with those institutional standards that achieve this particular kind of cognized uptake among a specific group of individuals.[85]

Now, by tying the existence of legal standards to this sort of social fact, it might appear that Hart was simply leading legal theory back towards a Realist understanding of law.[86] However, unlike his Scandinavian predecessors, Hart argued that the fact that law

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[83] H. L. A. Hart, "Comment" in R. Gavison, ed., *Issues in Contemporary Legal Philosophy* (Oxford: Clarendon Press, 1987), 36-37.

[84] Hart, *Concept,* 100.

[85] Ibid., 116.

[86] So much so, that Alf Ross could not identify any significant points of

is comprised of social rules has certain normative implications. More specifically, he contended that legal rules are capable of creating normative membership-conditions within a given systemic framework.[87] So, for example, if a polity's body of legal officials all accepted a rule that required the institutions of law to treat its citizens equally, then there is a clear sense in which those agents could not legitimately pursue the legal enactment of an asymmetrical rights scheme. By playing upon this idea, Hart developed an understanding of law that is readily distinguishable from that of the Realists. For, where scholars such as Alf Ross thought of the legal "validity" of governmental practices or policies as being a matter of whether they "are effectively followed, and followed because they are experienced and felt to be socially binding" [88], Hart came to construe this concept as being a matter of whether such phenomena satisfy the above sorts of "tests" of systemic membership.[89]

Now, from what has just been said, it should be clear that Hart's appreciation of the nature of social rules, and their effects within complex rule-based practices, distinguishes his thoughts from those of his predecessors. But, more than this, his acknowledgement of these points allowed him to realize an entirely new way of modeling the nature of law. To understand this theoretical advancement, it is helpful to know that Hart followed Kelsen in thinking of legal governance as a hierarchical phenomenon.[90] However, unlike Kelsen, he did not mean to root this sort of practice in the theoretical fiction of a grundnorm. Instead he grounded his account of law in the de facto existence of what he called a "rule of recognition".[91] This "ultimate" or "master" legal rule is constituted by

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disagreement between himself and Hart. See, Alf Ross, "Review of H.L.A. Hart, The Concept of Law," *Yale Law Journal* 71 (1961-62): 1185–90.

[87] See H.L.A. Hart, "Positivism and the Separation of Law and Morals," in Hart, *Essays in Jurisprudence*, 59, and Hart, *Concept of Law,* 100. According to Hart, it is for this reason that "…we can say before a rule is actually made that it will be valid…"

[88] Ross, *On Law and Justice*, 17.

[89] Hart, *Concept of Law,* 103.

[90] H.L.A. Hart "Lon Fuller: The Morality of Law," in Hart, *Essays on Jurisprudence,* 360.

[91] Hart, *Concept of Law,*108.

the way in which legal institutions identify what is to count as law.[92] More specifically, it is grounded in the existence of a social rule comprised of all the criteria of membership that the bulk of officials in a legal system customarily accept and make use of within their law-applying and law-identifying practices.[93] As such, the rule of recognition provides a "unique identifying mark" to legal practices and policies that distinguish them from the standards and procedures of any other form of social organization at play within a given polity.[94]

By placing this theoretical tool at the center of his model, Hart was able to develop an understanding of law that speaks to both aspects of the legal scholars' dilemma. Firstly, the way in which the rule of recognition is informed seems to insure that any ascriptions of legal status that might be proffered on the basis of his theory will track the policies and regulations promulgated by a polity's governmental institutions. For, this mechanism establishes the content of the normative framework of law through reference to officials' own accepted practices of norm identification and application. That is, Hart's model attributes legal status on the basis of criteria that are customarily taken up by governmental executors, as guides to their own institutional practices. Secondly, Hart's deployment of the rule of recognition also speaks to the truism that legal standards must be systemically authorized. For, it is grounded in the idea that there is a social rule responsible for delineating the criteria of validity that a given policy must satisfy if it is to count as law. In this way, legal rules can be understood as dependent imperatives – they must satisfy the "authoritative" terms of legality established by customary official practice if they are to be considered institutionally binding.[95]

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[92] Ibid., 98.

[93] Ibid., 92. According to Hart: "The reason for still speaking of [the rule of recognition as] '*a* rule' ... is that, notwithstanding their multiplicity, these distinct criteria are unified by their hierarchical arrangement." See, H.L.A. Hart "Lon Fuller: The Morality of Law," in Hart, *Essays on Jurisprudence,* 360.

[94] Ibid., 96. That is, it "will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts" Ibid., 98.

[95] This particular rendering of Hart's work is not universally accepted within contemporary legal positivist circles. For example, Andrei Marmor offers some powerful

Now, at this point it is worth noting that Hart readily admitted that his portrayal of the law's authoritative aspect is a far cry from the sort of moral legitimacy that is claimed for it by natural lawyers.[96] Indeed, he argued that to hold that legal norms must possess moral authority is to run the risk of distorting one's understanding of this social phenomenon. Whereas, the idea that the authority of law is just a matter of its officials being bound to their own accepted terms of institutional legitimacy does not run afoul of such facts.[97] Rather, it explains how even in morally neutral, or even dire circumstances, it is still possible to talk about this feature of law and legal practice.[98]

What is more, this account of the dependence of legal imperatives also makes very good sense of the familiar idea that the transmission of legal powers, and the legitimate expression of them, is determined by standards of legal validity, such as rules of office and jurisdiction. That is, unlike Realist positions, it does not need to put a gloss on the fact that officials purport to derive and exercise their legal capacities through reference to

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arguments suggesting that, as a matter of proper exegesis and good philosophical thinking, Hart's contribution to legal theory should be understood to revolve around the role of official conventions, rather than official customs. See his, *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001), 4–5. For a careful analysis that supports the interpretation relied upon herein, see Julie Dickson's "Is the Rule of Recognition Really a Conventional Rule?," *Oxford Journal of Legal Studies* 27 no. 3 (2007): 373-402.

[96] Ibid.164-175.

[97] Later positivist scholars, such as Joseph Raz, have challenged Hart's understanding of the law's authoritative aspect. Yet, all such theorists follow Hart in maintaining that the moral perspicacity of a standard, does not determine its status as law. See Raz's, *Authority of Law* 2nd edn. (Oxford: Oxford University Press, 2009) ch. 2, ch. 12.

[98] Thus, in a different context, Hart was free to argue that:

> In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.

See, *Concept of Law*, 114.

an empowering normative-framework. Nor, does it try to cram every instance of legal practice into the sovereign/subject descriptive paradigm, as within command theories. Thus, Hart's position can be seen to provide a more descriptively advantageous treatment of the law's authoritative aspect than the majority of his forerunners.

Given these considerations, there is warrant to assert that Hart succeeded in joining Kelsen in the development of an account of law that is capable of overcoming the legal philosophers' dilemma. Yet, there is no theoretical stalemate to be found here. For, Hart's social-rule based theory of law is further bolstered by the fact that it does not fall prey to either of the main theoretical difficulties encountered by Kelsen's position. First off, where Kelsen relied upon a hypothetical grundnorm, in order to portray legal standards as being authoritatively established, Hart was able to point to the de facto existence of a customary rule of recognition in order to do the same job. Thus, unlike Kelsen's "philosophical jurisprudence", Hart's model does not maneuver around the requirement to provide a substantive account of the authoritative aspect of legal norms. Rather, its shows how this phenomenon can be understood, such that it naturally exists within the institutionalized practice of government, that is law. Consequently, where Kelsen's understanding of the science of law is open to accusations of resting on nonsense, Hart's is constructed so that it is rests upon the solid foundation of sociological fact.[99]

The other descriptive advantage that Hart's model holds over Kelsen's, is that it provides a much more holistic account of the nature of law and legal practice. For, by contending that the considered behaviors of legal administrators are sufficient to establish a framework of institutional authority, Hart was able to portray the law as being intrinsically possessed of both normative and sociological features. That is, he was able to contend that the "is" and "ought" of reality blend into one another within the

[99] This is not to say that Hart's position hasn't been questioned on this basis. Most famously, Dworkin argues that there are no broadly shared practices of legal validation within institutional governance. Thus, the rule of recognition is as much a piece of legal fiction as the grundnorm. See, Dworkin, *Law's Empire*, ch. 1. Indeed, even certain positivist scholars, such as Scott Shapiro, take this to be the key failing of the Hartian position. See his, *Legality*.

phenomenon of institutionalized governance and, more specifically, the practices of legal officials. So, whereas both the Realists and Kelsen constructed their accounts of law in a way that precluded acknowledging either the de facto or normative aspect of social practice, Hart was able to develop an account of law that seamlessly stitches these two facets of reality together.

Given this point, and the foregoing considerations, Hart appears to have offered a theory that transcends the problems traditionally associated with philosophical accounts of law. But what is more, he did so in a way that recaptured the completeness and unity of the earliest positivist theories while advancing the overall descriptive-explanatory acuity of the analytic project.

With this firmly in mind, it is time to wind down this abridged chronicle of legal scholarship. But, before concluding, two final points ought to be made clear. On one hand, despite the theoretical appeal of Hart's position, very few legal scholars would contend that his work constitutes the final word on how to model the nature of law. Rather, there is a large body of scholarship expressly dedicated to critiquing and improving upon his original position. Most notably, there has been a gradual movement towards investigating the relationship between the terms of law's institutional practice and the notion of "practical reason" – an association left mostly unconsidered, or at least un-represented within Hart's delineation of his subject.[100] Yet, in spite of its limitations, Hart's work stands as a watershed moment in the history of legal positivism, as well as analytic jurisprudence more generally. And as such, it will be used as a benchmark towards which the current undertaking will aspire, and from which it seeks to advance. That is, the theoretical developments suggested in the forthcoming chapters will be made with an eye to preserving the harmony and descriptive acuity of the Hartian account of

[100] For an overview of the early development of this trend, see Neil MacCormick, "Contemporary Legal Philosophy: The Rediscovery of Practical Reason," *Journal of Law of Law and Society* 10, no. 1 (1983): 1-18. For some of the most important works in this vein, see Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), and Finnis, *Natural Law*.

law, even while some of its more notable features will be singled out for challenge and strategic remodeling.

1.5 Conclusion

The point of this chapter was to provide the background information that is required for the reader to appreciate the nature of the current project. As such, it began with the delineation of its methodological and analytical orientations; as a philosophical project of analytic jurisprudence aimed at contributing to the current understanding of the law as such. In what followed, a quick summary of relevant historical scholarship was provided. This began with a discussion of the natural law position, and ended with the delineation of Hart's positivist approach. In this way, the reader has been familiarized with the theoretical background that must be acknowledged and accommodated within the advances to be suggested hereafter. With these considerations in mind, the next chapter will highlight some rarely considered descriptive problems faced by Hartian positivism, in both its original and contemporary incarnations.

Chapter 2:
The Institutional Complexity of Law

Within the previous chapter's historical discussion, significant emphasis was placed upon the idea that a successful account of the nature of law must be able to accurately model the social reality of legal practice. And, after a somewhat cursory analysis, it was noted that one of the strengths of H.L.A. Hart's rule-based version of legal positivism was that it seemed to offer a promising avenue of accommodating this requirement. Here, in the second chapter, a harder look will be taken at Hartian positivism's capacities on this front.

To begin, the discussion will highlight the existence of, and the early positivist response to, an analytically challenging feature of contemporary legal governance. Next, it will consider how well Hart's conception of rule-based positivism is able to capture all the relevant administrative practices surrounding this facet of law. Given a troubling result, the chapter will then move to investigate whether contemporary incarnations of the Hartian project can provide for a better descriptive-explanatory platform than their progenitor.

2.1 Constitutional Boundaries

As was previously pointed out, legal positivism emerged as a reaction to the assertion of certain natural lawyers that the legal standing of a norm is dependent upon its being consistent with certain objective moral standards. More specifically, positivist

scholars are troubled by the fact that such a maneuver allows for legal status to be unduly determined by normative criteria whose source and application are practice-independent. Since, any model of law, that formulates ascriptions of legality in a way that does not necessarily speak to the terms of human practice, admits of the possibility that its depiction of legal governance could be quite different from what is actually taking place on the ground within a given community.

In order to protect against this problem, many early positivists constructed their positions so that the lawfulness of a standard could be determined solely through reference to the terms of human action. As has previously been explained, it was with this end in mind that command theorists asserted that the legal status of a norm is a matter of its having been intentionally "established by political superiors" who are habitually obeyed.[101] Whereas, the Scandinavian legal realists held that determinations of legal standing ought to be informed by whether a standard has achieved enough psychological uptake to gain efficacious political influence within a polity.

To the extent that these primitive positivist accounts suggest that determinations of legality ought to be made through reference to social facts alone, they manage to avoid the descriptive distortions that are associated with the position of natural law. Yet, this maneuver comes with its own descriptive-explanatory problems. For, such positions find themselves hard pressed to make good sense of the fact that legal institutions sometimes purport to regulate their own content via binding normative criteria, such as those so often referred to within constitutional statutes.[102] After all, it is difficult to reconcile the idea that the lawfulness of a standard is always determined solely by social facts with the institutional practice of purporting to use abstract norms to place entrenched boundaries

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[101] Austin, *Province of Jurisprudence*, 3.

[102] For one example among many, the Canadian Constitution asserts that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Further more it holds that any standard of practice in violation of this constraint is of "no force and effect". See, *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.Constitution Act, 1982, Sec. 7, 52: http://www.solon.org/Constitutions/Canada/English/ca_1982.html

upon the terms of law.[103]

While early positivist accounts were problematized by this phenomenon, Hans Kelsen's "pure theory" of law gained significant descriptive-explanatory traction with regard to it. For, on Kelsen's understanding, a social rule only counts as a legal standard when it can be coherently interpreted as being a member of the hierarchy of legal prescriptions. Thus, on this account, legal membership is a matter of the substantive compatibility of a rule with the rest of the law's normative framework. As such, his theory can explain how it is that "the constitution [of a legal system] can negatively determine that the laws must not have a certain content e.g. that the parliament must not pass any law which restricts religious freedom".[104]

What is more, Kelsen is able to secure this descriptive-explanatory advantage in a way that is strictly tied to the terms of actual social governance. He realized this feat by espousing two conditions of interpretive legitimacy. The first of these "epistemological" requirements is that legal norms must be standards that have been "created by an empirically identifiable act".[105] That is, legality can only be legitimately attributed to rules that have been socially established. For the second of these conditions, Kelsen requires that the attributions of lawfulness must match up with what legal officials collectively understand the terms of law to be. Thus:

> If a statute enacted by the legislative organ is considered to be valid although it has been created in another way or has another content than prescribed by the constitution, we must assume that the prescriptions of the constitution concerning legislation have an alternative character. [106]

Together these two interpretive conditions make it so that Kelsen's "normative

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[103] See, for example, Austin's "Law: Sources and Modes" where he contends that the power of the sovereign to make law is "unlimited and incapable of any legal limitation". See, John Austin, *Lectures on Jurisprudence of The Philosophy of Positive Law* ed. Robert Campbell (London: John Murray, 1885) 520.

[104] Kelsen, *General Theory*, 125.

[105] Kelsen, *Pure Theory*, 73.

[106] Kelsen, *General Theory*, 156.

jurisprudence" cannot depict the terms of legal governance in a way that significantly deviates from what is actually taking place within a given community. Thus, he was able to boast of providing for an "an exact structural analysis of positive law", even while he explained how the law's normative framework could be self-restricting.[107]

Now, in the previous chapter, Kelsen's position was centered out as being a particularly groundbreaking account of law. And, even without endorsing his solution to the current issue, it must be admitted that the innovativeness of his thinking is on display here as well. For, prior to the "pure theory", positivists were generally content to offer fairly limited descriptive-explanatory accounts of law and legal practice, insofar as they tended to focus their efforts upon modeling the de facto terms of legal governance in a polity. However, Kelsen's explicit attempt to do justice to the law's normative self-regulation represents something further. For, here he strives to accommodate what he refers to as the "dynamic" nature of law: the fact that legal systems normatively empower their officials to create and apply the terms of law.[108] As such, Kelsen's work ought to be recognized for raising the bar of legal scholarship, by developing a descriptive-explanatory account of law that speaks to legal systems' normative relationship with their officials, as well as to the de facto terms of their governmental practices.

And yet, despite all of this, one must remember that the Kelsen's "normative jurisprudence" suffers from those rather serious analytical deficiencies that opened the door for H.L.A. Hart's account of the nature of law to achieve prominence.[109] In light of this, the following question arises: how well is Hart's rule-based version of legal positivism able to balance an accurate account of law's governmental structure, with a viable explanation of those practices related to its ostensible capacity for normative self-regulation?

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[107] Kelsen, *Pure Theory*, 71. For the purposes of this paper, an investigation into the veracity of Kelsen's claim to have provided this "exact" analysis can be safely left aside, for reasons to be explained presently.

[108] Ibid.

[109] Namely: the reduction of the analysis of law down to a purely normative endeavor and the inability to provide anything like a compelling account of the law's native authority.

2.2 Hart Examined

In order to respond to this query, it is worth taking a minute to reiterate a couple of points. First and foremost, all of Hart's positivist forerunners had made sure to formulate their theories so that any particular ascription of legality could be verified solely through reference to matters of social fact; whether this meant the existence of a sovereign's command (Austin), the shared psychological experience amongst members of a polity (Ross), or a widespread belief, amongst officials, as to the legality of an institutionally established norm (Kelsen). Second, this common approach emerged from the theoretical considerations that underwrite the positivist rejection of natural law theory – namely, that such accounts could not be certain to accurately model the terms of the institutional practice of governance. The reason for reciting these now familiar points is to underline the surprising fact that the work of Hart, the modern figurehead of legal positivism, may not be in accord with this traditional piece of positivist policy. Please, allow me to explain.

On one hand, it is certain that Hart did not mean to ascribe legal status on the basis of some practice–independent *source,* such as a naturally inherent morality.[110] For, his account is centered on the rule of recognition, which specifies "the unique identifying mark or criterion of the validity of (legal) rules" via reference to the officially accepted terms of legal governance.[111] On the other hand, this theoretical mechanism establishes "tests" of the legal standing of candidate rules.[112] And, it is on this point that Hart's account becomes susceptible to the assertion that it diverges from the traditional positivist modus operandi. For it may well be that the tests of law, contained within the rule of recognition, can be independently active. That is, they may not need to be applied by an agent to have legal effect.

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[110] This is true at the level of analyzing individual norms. However, Hart does admit that the existence of a legal order is dependent upon its achieving a minimal degree of compatibility with certain natural "moral" facts. On this point see his discussion of legality's "Minimum Content of Natural Law" in, Hart, *Concept of Law,* ch. 9.

[111] Ibid., 102.

[112] Ibid., 103.

Now, this is not a possibility that Hart ever took much time to address, so the ascription of it to his work is bound to be tendentious. This said, there is a case to be made here. First of all, there does not seem to be anything incoherent about the idea that the logical relationship of a prospective legal norm to the rule of recognition could be enough, in and of itself, to qualify or disqualify that standard as a law. What is more, Hart did not take any measures to preclude this theoretical possibility. That is, he could have followed in Kelsen's footsteps by tacking a set of "empirical" conditions onto his account of legal dynamics. For example, he could have held that determinations regarding a standard's legal status must be the result of a human judgment. However, he did not.[113] On the contrary, Hart once famously asserted that, "nothing which legislators do makes law unless they comply with fundamentally accepted rules specifying the essential law-making procedures."[114] Thus, he actually seems to have allowed for the practice-independent application of a rule of recognition, insofar as he asserts that intentional institutional activities would be legally moot just insofar as they are in tension with the requirements of legal validity. Indeed, this sentiment seems to be echoed within a separate discussion, when Hart claims that:

> …a constitution could include in its restrictions on the legislative power even of its supreme legislature not only conformity with due process but a completely general provision that its legal power should lapse if its enactments ever conflicted with principles of morality and justice.[115]

Now, while I readily admit that this picture of Hart's position is only quickly and vaguely sketched, the textual evidence cited does seem to support the idea that the tests, identified by the rule of recognition, can be independently active normative criteria. As

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[113] Like the issue of law's moral standing, this statement is true at the level of applying the rule of recognition to a particular legal norm. For, Hart does adopt an empirical condition that applies at the level of legal order. This is specifically identified with the fact that "the rules recognized as valid at the official level are generally obeyed". Hart, *Concept of Law*, 118.

[114] Hart, "Positivism and the Separation of Law and Morals", 59.

[115] Hart, "Lon Fuller and the Morality of Law," at 361.

such, I submit that Hart had bucked the traditional positivist approach of making attributions of legal status immediately depend upon matters of social fact and had, instead, allowed that the relationship between norms could be the determining factor of a rule's legal standing.

So now the question becomes: just what implications does taking this seemingly a-typical positivist approach have for Hart's descriptive-explanatory analysis of the terms of legal practice? To begin, it is obvious that Hart's account provides theoretical room for the idea that the law is capable of normative self-regulation. After all, insofar as the legal officials of a polity accept normative criteria as binding conditions of legality then those standards become a part of the rule of recognition. As such, they are established as the "supreme criterion of validity" capable of restricting the content of law's normative framework.[116] Thus, his model seems to offer a manner of theoretically accommodating this dynamic feature of legal practice.

However, things are not so straightforward regarding this account's ability to track the structure of de facto legal governance. On one hand, by identifying the terms of law via the standards of legality actually accepted by officials, it is likely that Hart's model will usually track those rules in play within the institutionalized governance of a given polity. Yet, this point must be tempered with the acknowledgment that, insofar as the rule of recognition can be an independently active determinant of law, Hart's theory creates conceptual room for there to be a disjuncture between the standards of conduct that are given institutional uptake and those that legitimately constitute the framework of law. As an illustration of this phenomenon, one need only return to one of Hart's own examples. Specifically, if a legislature were to issue a norm whose content was in tension with the rule of recognition, then - even if that standard were being used to guide and ground the practice of institutional governance - it would be precluded from being accorded legal status. For, as he states, "nothing which legislators do makes law unless they comply with fundamentally accepted rules specifying the essential law-making procedures". To the extent that such situations are possible, Hart's theory appears to stumble in trying to

[116] Hart, *Concept of Law,* 106.

supply an accurate structural representation of the terms of legal governance.

Another way to express this finding is to note, with no small trace of irony, that Hart's rendering of the positivist position may place it in something of the same descriptive bind faced by natural law accounts, and for some of the same reasons.[117] That is, the structural problems faced by Hart's account are the result of its allowing for practice-independent determinations of law.

But, surely, this way of framing the implications of Hart's position gives us reason to step back and ponder the verity of the current discussion; maybe it even gives us reason to think that the above interpretation of rule-based positivism should be viewed with a healthy dose of skepticism. But then what? What if Hart had something else in mind with regard to how the legal tests identified by the rule of recognition are supposed to be applied when making ascriptions of law?

For my part, I accept that basing any significant conclusions about the nature of Hart's project on this tentative understanding his position would risk running afoul of responsible scholarship. That said, it is unclear that any interpretation of Hart's work would be clearly correct. For, his references to this issue are brief and vague.[118] Thankfully though, the analysis of rule-based positivism's descriptive-explanatory acuity does not bottom out on this point of interpretive indeterminacy. For, the delineation of this position is not limited to the work of its founder. Rather, the idea of the rule of recognition, and the other aspects of Hart's rule-based account have been taken up, elucidated, and elaborated upon by a series of legal scholars. And, these theorists have been much clearer in explicating their own understanding of the operations of the rule of recognition. Thus, it is possible to sidestep any exegetical debates pertaining to Hart's own beliefs on this point, and instead move on to explore the success of contemporary

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[117] This point is played upon by Mark Murphy in arguing for the descriptive-explanative legitimacy of natural law positions. See, *Natural Law in Jurisprudence and Politics*, 19.

[118] For an excellent discussion on this point, see , Kenneth Himma's, "Inclusive Legal Positivism" in Jules Coleman and Scott Shapiro, eds., *Oxford Handbook of Jurisprudence and Philosophy of law.* (Oxford: Oxford University Press, 2002).

accounts of rule-based positivism in modeling the dynamic and structural aspects of the philosophical analysis of law.

2.3 Questioning the Status Quo: Contemporary Hartian Theory

Before pursuing this investigation, a few things need to be discussed. First, it is important to emphasize the fact that the foregoing discussion was meant to serve as an introduction to the current analysis. As such it was allowed to move forward on the basis of certain quickly drawn conclusions. However, in order to provide for a more compelling analysis of the descriptive-explanatory capacities of contemporary Hartian positivism, the work that follows will be undertaken with significantly more analytical rigor.

Second, it is important to recognize that the scholarly heirs to Hart's theoretical perspective have established a number of different ways of modeling the dynamics of the rule of recognition. So, to insure that the descriptive-explanatory capacities of rule-based positivism are not given analytical short shrift, the coming evaluation must not be limited to the treatment of any single conception of it. Rather, it will be constructed so as to speak to as many contemporary Hartian positions as possible.

Finally, it is important to acknowledge the fact that the diversity of modern Hartian thought is due, in large part, to the different answers that contemporary scholars have given to a single fundamental question of the philosophy of law: namely, can moral norms exist as members of the normative framework of law? While it is clearly antithetical to a positivist theorist to assert that this would *necessarily* be the case, there are many such scholars who think that it is contingently possible. That is, they endorse the claim that a community's legal administrators might incorporate moral considerations into the social practice of law, and hence into its normative framework. As such, these theorists have become known as "inclusive legal positivists".[119] On the other side of the

[119] For some of the more recent pieces endorsing this postion see: Matthew Kramer**,** *In Defense of Legal Positivism: Law Without Trimmings* (Oxford: Oxford

fence are those who maintain that the law is only comprised of source-based norms – that is, norms that find their origin within socially established sources. While these theorists are quite happy to admit that moral considerations can be referenced and can even play decisive institutional roles within legal practice, they assert that such occurrences are best explained as the official acknowledgment of a normative framework that stands outside or perhaps alongside of the terms of law. Proponents of this second position have become known as "exclusive legal positivists".[120]

Now, despite the fact that each of the broad conceptions of positivism to be explored in the forthcoming investigation were forged as inclusive or exclusive accounts of law, the current work does not purport to have a horse in that race. Which is to say that this endeavor will not attempt to answer the question of whether moral standards can count as legal norms.[121] Rather, as has been previously stated, it is geared towards an analysis of the acuity of Hartian positivism as a whole, and will only seek to point out the descriptive-explanatory advantages and failings of its partisan renderings in order to realize that broader theoretical end.

With all of these points firmly in mind, allow me to commence.

University Press, 1999); Jules Coleman**,** *The Practice of Principle* (Oxford: Oxford University Press, 2001); and Wilfrid,Waluchow, *Inclusive Legal Positivism* (Oxford: Oxford University Press, 1994).

[120] Among adherents of this position, the work of Joseph Raz is preeminent. See his, "Legal Principles and the Limits of Law", *Yale Law Journal* 81 (1972): 823 and "Authority, Law and Morality" *The Monist* 68 (1985): 295. Other notable exclusive positivist works include: Andrei Marmor, *Philosophy of Law* (Princeton: Princeton University Press, 2011); Leslie Green, "The Concept of Law Revisited," *Michigan Law Review* 94 (1997); and Scott Shapiro, "On Hart's Way Out", *Legal Theory* 4 (1998): 469;

[121] As such, it will avoid what many legal scholars have come to think of as a "repetitious, trivial, and almost entirely pointless" debate. See William Twinning, "Imagining Bentham: A Celebration," in M.D.A. Freeman, ed., *Current Legal Problems 1998: Legal Theory at the End of the Millennium*, (Oxford: Oxford University Press, 1998), 121.

An Alternative Rendering?

The analysis of contemporary Hartian scholarship will begin by attending to a position that interprets the rule of recognition in a way that is meant to provide for an exact structural analysis of the terms of legal governance. While a number of different scholars have made an effort to realize this end, none have been more uncompromising than Michael Giudice.[122] As such, this first stage of this discussion will be focused upon his work in particular.[123]

While Giudice's interpretation of Hartian positivism is both nuanced and multi-faceted, there is one maneuver that most prominently distinguishes it from other accounts. Within Hart's work, it is clear that a standard's legal existence depends upon its ability to conform to the requirements of the rule of recognition. What is more, this ultimate norm is portrayed as being informed by the standards of legal membership "actually accepted and employed within the general operation of the system".[124] So within Hart's own understanding of the rule of recognition, lawfulness is ascribed via reference to those tests of legal validity that are taken up by institutional officials to identify the terms of law. It is here that Giudice's approach can be distinguished from his predecessor's. For, he flatly rejects the idea that determinations of law ought to be made on the basis of mechanisms that are at such a remove from the de facto governance of a polity. More specifically, Giudice focuses upon the idea that legal standing should be understood to be a matter of

[122] This is to say that where many scholars shy from making attributions of legality solely through reference to the terms of institutional practice, Giudice shows no such hesitation. For an example of this tendency, see his discourse on the legality of "preposterous" legal decisions, in "The Regular Practice of Morality in Law" *Ratio Juris*. 21 no. 1 (2008): 102-106.

[123] This selection is in no way a judgment against the worth of other projects of this sort. Kenneth Himma, for example, provides another instance of this sort of project. See his, "Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States." *Journal of Law in Society* 4 (2003): 149–216; and "Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism," *Law and Philosophy* 24 (2005): 1–45.

[124] Hart, *Concept of Law,* 108.

the "official practice" of particular policies.[125] That is, on his recasting of Hart's model, a norm can be said to be legally valid – and therefore exist as a standard of law - insofar as it is generally "recognized" and "practiced" by the bulk of administrators of the institutionalized government of a polity.[126] Thus, he offers an account of the dynamics of the rule of recognition, wherein determinations of legality are made through reference to the governmental policies that officials customarily treat as "binding", rather than by attending to the results of whatever substantive tests they customarily accept as properly identifying the content of law.[127]

With this appreciation of Giudice's position, it is time to ask how his account fares with regard to the two descriptive-explanatory considerations identified in the introductory discussion of this chapter: the ability to track the de facto structure of legal governance and the ability to offer a plausible portrayal of legal dynamics.

Now, because Giudice's work developed out of a desire to insure the structural veracity of the positivist position, it seems only fair that the current analysis should begin by investigating its success on that point.[128] But before embarking, a bit more can be said about the expectations of this sort of inquiry. To begin, it is important to reiterate that positivists generally think of the structural analysis of law as being a matter of identifying

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[125] Giudice, "The Regular Practice of Morality in Law", 104-106.

[126] Ibid., 106.

[127] See, Michael Giudice, "Existence and Justification Conditions of Law". *Canadian Journal of Law and Jurisprudence* 16 (2003): para. 7. There, he argues that "officials do not recognize criteria of validity, but rather they recognize laws."

On a different and more scholastic point, Giudice sometimes writes as though his work could be taken as an extrapolation of the theoretical perspective of Joseph Raz. However, while some of the consequences of his alternative rendering of the rule of recognition ostensibly serve Raz's exclusivist leanings, that scholar is committed to the idea that "the legal validity of a rule is established… by showing that it conforms to *tests of validity laid down by some other rules of the system* which can be called rules of recognition." In, Raz, *Authority of Law,* 150-1 (my emphasis). As such, Raz's thoughts on the grounds of legal validity appear to be more in keeping with the original Hartian viewpoint, than Giudice's revisionist account of it.

[128] Giudice identifies this as one of his primary theoretical stimuli in "Unconstitutionality, Invalidity, and Charter Challenges" *Canadian Journal of Law and Jurisprudence* 15 (2002), para. 17.

the de facto terms of legal governance. However, it needs to be admitted that this proposition is not very informative. For, what does it mean for something to be a matter of "legal" as opposed to "non-legal" governmental practice?

To answer this question, it is helpful to note that if there is any obvious hallmark of legal activity, it is that the agents responsible for the administration of government hold that an institutionally established normative framework legitimates their activities. Thus, it would seem that the challenge of offering a structural analysis of law – of being able to track the de facto terms of legal governance – is to devise a theoretical model that will ascribe legal existence to, and only to, those activities and standards that a polity's officials treat as having been authorized or demanded by such a schema.

Given this point, Giudice's theory can be seen to achieve great success in modeling the de facto structure of law. For, his formulation of the rule of recognition attributes legal standing to all and only those norms that institutional administrators actively treat as being the institutionally validated grounds of governmental practice. As such, the ascriptions of legality that emerge from his theoretical model seem to be just what is required of a structural account. Thus, it is clear that Giudice has managed to modify rule-based positivism, such that it is able to overcome the structural limitations that were earlier attributed to Hart's original formulation of it.

Now, while this is a significant descriptive-explanatory advance, it is not enough to fully resolve the current set of concerns. For, in order to be able to make sense of all the extant terms of the institutional practice of law, Giudice's augmented version of rule-based positivism must also be able to accurately model that phenomenon's dynamic aspect. Earlier, it was asserted that this task is a matter of offering a compelling descriptive-explanatory account of those practices that ostensibly pertain to substantive restrictions placed upon the terms of law. Yet, while this statement is accurate enough, it doesn't really explain why this issue is so theoretically important. The fact is that while the law is mostly thought of in terms of its ability to order the lives of its citizens and subjects, it is also explicitly oriented towards determining the behavior of its

administrators.[129] In other words, it is obvious that a great deal of institutional effort is spent trying to construct the normative framework of law in a way that corrals the organs of government towards the implementation of a certain set of policies. Thus, it is incumbent upon any plausible legal theory to accommodate the commonly understood ways in which the law is thought to be capable of normatively directing the behaviors of its institutional administrators.

Put simply, when institutions of government operate according to the normative framework of law, their activities are deemed to be legally valid; and when they deviate from the terms of that order they are understood to be operating invalidly. So, ultimately, the question for Giudice's position is: how well does his reconstruction of the rule of recognition capture the ways in which governmental practice is subject to the normative bonds of legal validity?

The answer, it will be contended, is that Giudice's understanding of rule-based positivism involves a conception of legal validity that is too deeply informed by the de facto practices of institutional administrators to plausibly account for the sorts of normative restraints that the law is generally thought to be capable of manifesting. In order to substantiate this conclusion, two descriptive-explanatory arguments will be presented. The first pertains to the problems that Giudice's account faces when it tries to account for the kinds of practices actually surrounding the identification of "valid" legal norms. Whereas, the second argument raises some concerns regarding the degree of normative control that his model allows for the law to realize over its governmental administrators.

In order to get the first argument off the ground, it is helpful to think back to the discussion of Scandinavian Realism from the previous chapter. More specifically, recall that Hart had once initiated a descriptive critique of that position by highlighting the fact that,

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[129] Indeed, Kelsen thought that this aspect of it was so central that he believed that legal norms were only oriented towards the institutional administrators of government. See Kelsen, *Pure Theory,* Sec. 33.

> 'This is a valid rule or law' said by a judge is an act of recognition; in saying it he recognizes the rule in question as one satisfying certain accepted criteria for admission as a rule of the system and so as a legal standard of behavior.[130]

The point of this observation was that the Realist account of statements of legal validity - as positive predictions of policy implementation - just did not match up with how that concept is deployed within actual legal practice.

Now, Giudice's project is not meant to support a predictive theory of law. However, it is central to his account that a given policy's legal validity be modeled in terms of whether it is treated as though it is binding by the governmental administrators of a polity. As such, Hart's critique of legal realism is no less devastating here, since it draws our attention to the fact that governmental administrators do not try to determine the legal validity of a norm by asking only whether a standard has been generally operationalized and portrayed to be binding by its administrators. Instead, they seek to resolve such questions by investigating whether a given policy satisfies certain normative conditions of systemic membership.[131] Thus, Giudice's legal model can be seen to cast the idea of validity in a way that is at odds with the contours of those legal practices within which this concept is most frequently and importantly deployed. As such, it seems that Giudice's revised positivist model casts the concept of legal validity in a way that distorts it. And this, needless to say, is a very problematic result for any theory that is promoted on the basis of its ability to provide for an accurate descriptive-explanatory account of law.

Because of the significance of this problem, it is important to pause and consider a couple of responses that Giudice might be tempted to offer. First, he might contend that it is actually legal officials, and not his model, that misrepresent the nature of legal validity. That is, he might try to argue that while his account does not perfectly match up with

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[130] Hart, "Scandinavian Realism", 165.

[131] Now, there is nothing to say that the criteria of validity in a polity might be that legal officials have portrayed a standard as law and implemented it as such. However, one can admit of this possibility without being committed to Giudice's idea that these two conditions amount to the requirements of validity *in every case*.

what Jules Coleman calls the "surface syntax" of the courts, we should be open to the possibility that the underlying rationale of validity-regarding legal practices actually amount to the ascertainment of whether a given standard is recognized and practiced as law by the bulk of legal officials.[132]

Though this initial defensive maneuver might sound plausible, Giudice's position cannot be saved by it. Since, the most famous and important of all validity-regarding behaviors are those that arise when legal officials call into question and *reject* the validity of policies that are already practiced and portrayed as officially binding law. Consider, for example, instances where currently enforced legislation is overturned within the process of strong judicial review. In such circumstances Giudice's account of legal validity is not just in tension with the juridical dicta surrounding legal reasoning, but actually it is antithetical to any and all such findings of invalidity – decisions that regularly and widely occur in practice. As such, he cannot plausibly claim that his model represents the underlying structure or rationale of validity-based legal practices.

Given this last point, I think that if Giudice were intent upon maintaining his position, he would be left with only one option. He must bite the descriptive bullet and assert that the concept of legal validity is significantly different from how it is construed within its institutional deployment. That is, he must ask his readers to accept a substantial dissonance between the representation of law that he proffers and the terms of law's social reality, at least with regards to the practices that surround issues of legal validity.

While certainly undesirable, this state of affairs is not necessarily damning to Giudice's work. For, in the end, the descriptive-explanatory appeal of his position may outweigh whatever representational distortions it is guilty of, regarding the various institutional usages of the concept of legal validity. This said, it is important for the failing to be catalogued and, when the time comes, properly weighed. With that understood, it is time to discuss the next point of concern.

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[132] See, Jules Coleman, "Constraints on the Criteria of Legality" *Legal Theory* 6 (2000): 171–183 at 176. In what follows, this term will be recast as "surface-semantics" in order to give it a clearer scope of application.

While the foregoing critique was meant to question Giudice's account of the nature of legal validity, the forthcoming argument will focus upon how his peculiar rendering of this concept precludes him from capturing the full degree of normative control that the law is thought to be capable of exercising over its administrators. It is helpful to begin this discussion by noting that the normative framework of law is usually understood to be capable of binding its administrators at two different levels of action. First, and perhaps most fundamentally, the law is generally thought to be capable of placing substantive legal limits upon the activities of *individual* governmental administrators. For, insofar as such agents are understood to be officials – insofar as they are said to inhabit a normatively constituted "office" – the legality of their behavior is generally understood to be conditional upon its conforming to the terms of their official empowerment. As such, this sort of individual normative restriction is one that any plausible theory of law must be able to explain. For Giudice's part, he can speak to this phenomenon through reference to the legitimating power of legal validity. That is, on his understanding, an act is only legally valid if it comports with the standards of practice that the bulk of officials generally portray as being binding and which they give effect to. Thus, were a particular legal official to violate the institutionally accepted terms of proper practice, then that lone administrator could be said to have acted invalidly, and thereby have stepped outside of the legitimating structure of law.

But the individual level is not the only plane on which the law is understood to normatively bind its administrators. It is also widely thought to be capable of placing restrictions upon collective official activity. This aspect of the law's capacity to normatively constrain itself is most prominently displayed within the realm of entrenched constitutional law. Herein, governments regularly purport to establish the terms of legal validity in a way that is specifically insulated from changes that might be brought about by shifts in officials' attitudes and behaviors. Indeed, the strictest constitutions include norms that purport to determine criteria of validity in a way that is meant to resist the

possibility of ever being changed, under any conditions, by any person or group.[133] It is with regard to these sorts of group-level official restrictions that Giudice's theory faces descriptive-explanatory problems. Since, on his understanding, whatever policies the bulk of officials purport to be bound by, and which they enforce as law, become legally valid irrespective of any other considerations. Thus, Giudice effectively claims that the collective actions of legal administrators are self-validating. As such, on his account, it is impossible for the normative framework of a legal system to bind the class of officials to any given set of substantive terms in the way that constitutional law often seems to suggest is attainable. Thus, there appears to be a discrepancy between the set of legal restrictions that are at play within the practice of law and those that Giudice's theory can account for. As such, his remodeling of Hart's positivist account appears to have run into another descriptive-explanatory problem.

In order to assuage this apparent tension, Giudice has moved to re-conceptualize the nature of those norms that ostensibly establish collective official restrictions. To this end, he has suggested a move away from thinking of constitutional guarantees as rules that are capable of restricting the body-official from deviating from the terms of law. Rather, he asserts that these standards should be construed as legal objectives - as institutional aspirations that officials are empowered and bound to try and realize in practice.[134]

While a novel solution, this re-description looks to be a descriptive-explanatory stretch. For, the language of "objectives" fits awkwardly with the actual semantics and practices that often surround the institutional expression of these norms. Take, for example, the wording of section 52(1) of the Canadian Constitution Act, which states that:

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[133] Here, I am referring to certain sections of the French, German, and Honduran constitutions.

[134] See, Giudice, "Existence and Justification Conditions of Law", wherein he modifies the concept of "directed powers" proffered by Joseph Raz. See Raz, "The Inner Logic of the Law" in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1996) at 242.

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[135]

Understood literally, this statute is unequivocal in its assertion that the practice of Canadian law *must* be comportable with the set of standards expressed within the constitution. And this reading is exactly what the Canadian courts purport to give force to, such that the judiciary consistently understands any governmental policy or statute that exists in tension with the constitution as being normatively void "*ab initio*".[136] As such, it seems that Giudice's re-conception of these sorts of norms simply does not jive with the way that they are presented and understood within the practice of law.

Ultimately, the point here is that many legal systems have constructed their normative framework in a way that is meant to proactively constrain the entirety of the official body from pursuing certain avenues of legal governance, rather than just providing those agents with a list of preferred activities. And, insofar as Giudice's position cannot account for this phenomenon, it fails to model an important aspect of the institutional reality of law and legal practice.

This said, it remains open to Giudice to argue that the overall acuity of his position is such that this theoretical blemish can be excused - along with the earlier dynamic problem pertaining to his account of validity. That is, he might persist in claiming that the structural accuracy of his model is so compelling that its dynamic faults ought to be accepted as a necessary evil. However, this would be a very hard sell. For, it amounts to the suggestion that the best analytic account of law is an obviously flawed one.

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[135] *Canadian Charter of Rights and Freedoms*.

[136] See, for example, *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. This understanding of the force of constitutional documents is echoed in the legal systems of other polities, as well. For example, within the context of American law, Justice Field once stated that: "(a)n unconstitutional act…confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." See *Norton v. Shelby County* (1886) 118 US 425 at 422 quoted in Waluchow, *Inclusive Legal Positivism*, 152.

Tried and True?

While it is clear that there are certain theoretical advantages that can accrue from interpreting the rule of recognition along the lines suggested by Giudice, a great many legal philosophers remain committed to an understanding of that mechanism more like the one earlier accredited to Hart. This is to say that they contend that the official acceptance of a set of validity criteria can serve to establish normative tests which are capable of independently regulating the content of law. As such, the thrust of the current section will be to assess these more traditional approaches to contemporary Hartian legal scholarship.

While this might sound like a fairly straightforward proposal, it is complicated by the fact that there are a wide array of positions that fit the current bill. So, for the sake of analytical parsimony, it is helpful to attend to a certain theoretical distinction at play within the relevant literature. More specifically, there are two ways in which tests of legal validity might be thought to function: as necessary or as sufficient conditions of lawfulness.[137] When standards are construed as *necessary* conditions of legality, they are understood to serve as constraints upon the content of the normative framework of law. That is, they make it such that the only practices and policies that can attain positive legal standing are those that satisfy their requirements. So, for example, if it is a necessary condition of law that it support the principle of fair distribution then no law can be made that does not satisfy this criterion. This said, the fact that some standard happens to pass such a test is not enough to establish it as law. For, the relevant norm must also be put into institutional play via explicit official proclamation. On the other hand, to say that a test of validity acts as a *sufficient* condition of legal standing is to assert that it establishes, as law, all the standards that satisfy its requirements. And this is true, irrespective of whether legal officials happen to promulgate and practice those designated standards.

[137] This distinction corresponds to what Kenneth Himma describes as the difference between the "necessity" and "sufficiency component" of Inclusive Legal Positivism, except that it is not limited to moral criteria of validity. See Himma,"Inclusive Legal Positivism".

Thus, if a sufficient condition of validity were established, requiring that the law conform to the terms of fair distribution, then every norm that advanced this ideal would be brought into legal existence with it.

Insofar as Giudice rejects the idea that the legal validity of a standard can be determined by anything other than whether it has achieved official recognition and practice, his position precludes either of these sorts of tests from having effect with regard to the normative framework of law. However, this is not the case for those scholars who adopt a more traditional understanding of the rule of recognition. In fact, one way to distinguish between these alternative accounts is to attend to the different membership limits that they place upon these two sets of standards. For example, Joseph Raz and Scott Shapiro allow for the existence of both necessary and sufficient conditions of legality, but prelude norms of either sort that requires the use of "evaluative reasoning" in identifying its legal determinations.[138] On the other hand, scholars such as Wilfrid Waluchow and Matthew Kramer only disqualify the possibility of sufficient conditions of validity that demand the conformity of law to the terms of morality.[139] Finally, there are those such as Jules Coleman who do not admit of any conceptual limitations upon these two kinds of validity criteria.[140] The point here is that, while they differ with regard to the precise conditions of membership, all traditionalist neo-Hartian accounts appear to allow for both of these kinds of validity criteria within their respective models of law. And, this shared commitment allows for some important structural and dynamic conclusions to be drawn about this grouping as a whole.

To begin, this discussion will examine the structural implications of asserting that the rule of recognition can establish necessary conditions of lawfulness. As a reminder, this is the idea that the rule of recognition can establish tests of validity that make it such that no law can be realized unless it satisfies certain procedural or substantive requirements. That is,

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[138] See, Raz, *Ethics in the Public Domain,* and Shapiro, "On Hart's Way Out".

[139] See, Waluchow, Inclusive Legal Positivism, and Matthew Kramer, "How Moral Principles Can Enter Into the Law" *Legal Theory* 6 (2000): 83-108.

[140] Coleman, "Constraints on the Criteria of Legality", 183.

> …source based tests of validity, *in their very nature as criteria or tests of validity*, are such that one can attempt but fail to satisfy them. Should any such failure occur, then, as a sheer conceptual matter, the result must be invalidity. In the case of something like legislative enactment, invalidity must amount to a nullity.[141]

While this is a rather familiar idea, it is plain to see that any neo-Hartian theory seeking to give it credence must bite something of a structural bullet. After all, consider what the proponents of such a view would have to say about a scenario where the legal officials of a polity generally give effect to a criminal statute that is in violation of a necessary condition of law. In such a situation, these scholars would be committed to the idea that the relevant standard, although it is consistently and broadly used to ground the arrest, trial, sentencing, and sanctioning of citizens, has no legal standing – that it is, in fact, a nullity. Thus, allowing the rule of recognition to incorporate necessary conditions of legal validity can thwart the attribution of legality to norms that are being used by officials to ground their governmental activities, and thereby possess the structural hallmark of law.

While this problem seems serious, some might argue that its edge can be blunted somewhat by pointing out that, for Hartian positivists, this kind of structural concern can only rear its head with regard to a couple of very particular social circumstances. After all, if necessary conditions of validity are established via the rule of recognition, then they are only binding insofar as they are accepted and practiced by the bulk of legal officials. Thus, the only instances where an officially heeded standard can be legally null is one where the bulk of institutional administrators have somehow come to govern a polity in disaccord with their own accepted terms of practice, and there are a limited set of circumstances in which this is likely to be realized.

On the one hand, there is the rare danger of generalized official error. That is, legal

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[141] Wilfrid Waluchow, "Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism", in Matthew Adler and Kenneth Himma, eds., *The Rule of Recognition and the United States Constitution,* (Oxford: Oxford University Press, 2009), 26. Emphasis in original, footnote omitted.

officials might collectively blunder when assessing the validity of some particular rule and thereby come to identify and practice it as valid law, despite its' failing to satisfy their accepted criteria of legality. It has elsewhere been contended that one example of this possibility can be drawn out of the Canadian *Manitoba Language Rights Case* of 1984.[142] Herein, the Canadian Supreme Court held that a century's worth of provincial statutes were invalid, insofar as they were in violation of an obscure constitutional provision dating back to 1870. When confronted with this calamity, a former premier contended that the entire debacle had emerged as the result of a generalized institutional oversight. In his words, "…everyone believed that the constitutional position was OK. Everyone!...It just came out of the blue as far as I was concerned."[143]

On a very different note, it also possible that legal officials might collectively act to contravene their own regularly practiced and firmly accepted conditions of legal validity. Here, it is helpful to think of what has come to be described as "states of exception": situations where there is a generally perceived concern of great and immediate practical importance, which legal officials believe requires them to organize their polity in a manner that their accepted criteria of legality do not condone.[144] It can be plausibly argued that this state of affairs has been recently realized within the United States of America, in regard to certain governmental activities pursued under the umbrella of 'The War on Terror'.[145]

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[142] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. The reference to this case comes from Waluchow, "Four Concepts of Validity". Now, there may be some who would challenge the use of this example due to certain of its juridical complexities. However, for present purposes, such considerations will be ignored since the case is only being used as an illustration of a possible state of affairs .

[143] Premier Duff Roblin, quoted in Raymond M. Herbert's, *Manitoba's French Language Crisis: A Cautionary Tale* (Kingston: Queens University Press, 2005) at 15.

[144] This concept was central to the legal theory of Carl Schmitt who identified such circumstances as "best characterized as a case of extreme peril, a danger to the existence of the state or the like". In, *Political Theology: Four Chapters on the Concept of Sovereignty*. George Swab, trans. (Chicago: University of Chicago Press, 2005) at 6.

[145] The most recent example of this pertains to the assassination of U.S. citizens without any attempt to satisfy the terms of due process. See Michael Hirsch, "With al-

Given the rarity of either of the above sorts of occurrences, any proponent of Hartian positivism who accepts that the rule of recognition can place necessary conditions upon the terms of law can claim that their position will generally do a fine job of representing the structural terms of legal governance.

While this sort of defense does show that the structural failures associated with necessary conditions of legality into the rule of recognition are somewhat limited in scope, its deployment ultimately serves to underscore the fact that a serious problem remains for any Hartian legal theory that incorporates them. For, this line of reasoning turns on the idea that such accounts will only be able to offer a correct structural account of law if officials behave themselves, by acting in accord with their accepted terms of proper practice. However, any position that rests the accuracy of its structural attributions upon such a contingency can only be thought to provide for a fair-weather picture of de facto legal governance, rather than an unflinching delineation of its actual institutional boundaries. Thus, it should be admitted that any version of rule-based positivism that attributes this function to tests of legal validity is vulnerable to a key structural failing.

With this in mind, it is now time to question the structural repercussions of portraying the rule of recognition as being capable of realizing sufficient tests of law. Remember now, that this amounts to the assertion that it is possible for conditions of legal validity to independently create legal content. Specifically, it is to allow that the rule of recognition could include criteria that establish, as law, whatever standards conform to their requirements. In what follows, it will be argued that when neo-Hartians allow for criteria of validity to function in this way they court a second set of descriptive-explanatory problems.

To understand why this is so, consider the theoretical implications of holding that it is a sufficient condition of legality for a norm to have been espoused by Plato, within his work *Laws*. Were this the case, then all the political rules detailed in that work would

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Alwaki Dead its Apparent that Obama's Covert Campaign Knows no Boundaries" *National Journal*, (Fri. Sept. 30, 2011): http://news.yahoo.com/blogs/exclusive/awlaki-dead-apparent-obama-covert-campaign-knows-no-161008956.html

exist as law, regardless of any other considerations. The point here is that it is not a condition of the legal existence of these norms that they ever be individually proclaimed, promulgated, or practiced as legal standards. Thus, for one to accept that the rule of recognition can realize sufficient tests of legal validity is to court the possibility that there might be extant legal norms that never achieve institutional uptake.[146] It is to attribute legality to norms that may never be used to ground the activities of institutional administrators. So, while the existence of necessary conditions of law can create structural problems by allowing that certain standards might be precluded from legal standing even though they bear all the performance-related hallmark of law, positing a model of law that admits of sufficient tests of legal validity provides for the existence of legal norms that do not possess any sort of procedural pedigree. Thus, to make conceptual room for the existence of such mechanisms is no less of a threat to the accurate structural representation of law.

Now, positivist scholars whose work centers on sufficient tests of validity are aware that their positions raise the specter of a representational disconnect from the terms of social reality. Thus, much like Kelsen, some of them rely upon interpretive pre-conditions to insulate their accounts from this problem. For example, Jules Coleman asserts that:

> If there are moral criteria of legality that are accepted by officials from an internal point of view and practiced by a sufficient number of them, and if the bulk of the population complies with the rules valid under these criteria, then there is a legal system in which morality is a condition of legality. The form of this thesis is precisely the same whether morality is a necessary condition of legality, a sufficient condition of legality, or a necessary and sufficient condition.[147]

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[146] Or, in Jules Coleman's words, "a norm can be law even if it lacks a social source". See, "Constraints on the Criteria of Legality", 175.

[147] Ibid. at 182. While other scholars such as Raz and Waluchow suggest theoretical limits be placed upon the set of possible validity conditions, they do so with an eye to conceptual coherence and not, as Coleman does, with an eye to representational accuracy. See, for example, Raz's "Incorporation by Law" *Legal Theory*, 10 (2004), 1–17, where he argues that moral conditions of validity are in tension with the law's claim

The key to Coleman's strategy is the assertion that sufficient conditions of legality – or at least those that pertain to morality - can be posited to exist only if "the bulk of the population complies with the rules valid under this criteria". Now, while this requirement appears rather ad hoc[148], it clearly does some descriptive-explanatory work. For, it prevents the existence of moral sufficiency criteria that would create a set of laws whose prescriptions are in tension with the terms of a polity's de facto social order.

Yet, such a maneuver does not resolve the descriptive-explanatory issue that is at play in the current discussion. For, on the one hand, the fact that Coleman's interpretive safeguard only applies to moral criteria of legality fails to speak to the full range of validity conditions that might create a disconnect between the terms of law and the terms of social governance. But even if one were to suppose that his proviso were expanded to apply to all sufficient tests of law, Coleman's interpretive criterion only ensures that prescriptions of law will be generally compatible with the de facto activities of *legal subjects*. However, the structural concern that is relevant here is whether a theory of law is capable of tracking the terms of institutional governance: the standards by which the administrators of law actually attempt to realize a particular social order. Thus, while his suggested augmentation may prevent some descriptive-explanatory tensions, it does not avert the sort of structural failing being discussed here.

Indeed, the only interpretive precondition that could fully protect the structural integrity of Hartian positions, which allow for sufficient tests of law, would be to hold that such mechanisms are only realizable in circumstances where legal officials have given institutional effect all of the terms of law that would be established by them. However, this maneuver would render the idea of sufficient conditions of law incoherent. For if such mechanisms are only extant in situations where all of the particular standards

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to authority. See also,Waluchow's, "Authority and the Practical Difference Thesis: In Defense of Inclusive Legal Positivism" *Legal Theory*, 6 (2000), 45–81, where he argues that sufficient moral validity criteria would establish conflicting and inchoate standards of law, at 75.

[148] After all, why does this interpretive condition only exist with regard to sufficient tests of law with moral content?

that they establish have already achieved institutional uptake, then they are no longer sufficient to establish legal norms. Thus, it is clear that Kelsen-ian approach to avoiding the structural failings associated with sufficient conditions of validity simply cannot work.

Given the acuity of the foregoing discussion, it seems that by allowing the rule of recognition to incorporate necessary and sufficient tests of law, traditionalist neo-Hartian accounts court certain structural shortcomings. As such, it is fair to question why any scholar would want to hang their hat on a model of law that embraced either of these sorts of validity criteria? There is an answer to this query, and it is a simple one. For, while this sort of position comes up short on the structural front, it can do a significantly better job of modeling the dynamics of law than the competition.[149]

For starters, any position that allows the rule of recognition to incorporate necessary and sufficient criteria of law will be able to accommodate Hart's observations regarding how the concept of validity is deployed within actual legal practice. Since, insofar as these positions model legal validity as a status which is reserved for those activities or standards that satisfy certain binding tests, they represent the dynamics of law in a way that is amenable with the fact that:

> 'This is a valid rule or law' said by a judge is an act of recognition; in saying it he recognizes the rule in question as one satisfying certain accepted criteria for admission as a rule of the system and so as a legal standard of behavior.[150]

On this point, the dynamic capacities of traditionalist neo-Hartian accounts supersede theories such as Giudice's; which, it was argued, is forced to portray the status of validity as being a matter of widespread official activity, rather than the satisfaction of normative criteria.

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[149] See Waluchow, "Four Concepts of Validity", as well as Matthew Kramer, *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004), and Coleman, *The Practice of Principle*, for extended discussions of this point.

[150] Hart, "Scandinavian Realism", 165.

What is more, the fact that these traditionalist positions allow the rule of recognition to establish necessary tests of legal validity means that they can explicate how the law is capable of binding legal officials at both the individual *and* the group level. For, these positions hold that when the body of legal officials come to accept that there is a substantive criteria which must be met for a practice or policy to attain legal standing, it really is the case that any activities or norms which fail to meet that standard are precluded from being counted as lawful. Thus, when an individual legal official acts in a way that is in tension with the generally accepted terms of legal validity, their behavior is rendered legally void. And, more importantly for the current discussion, this also holds true of violations that occur when the officials of a polity act en masse. That is, when the body of legal officials fails to live up to its own accepted standards of conduct, their activities, no matter how widespread or governmentally efficacious, are precluded from occurring under the ambit of law. So where Giudice's model of the rule of recognition results in a conception of law that makes all activities of the body-official self-validating, the more traditional neo-Hartian interpretations of this mechanism are able to carve out a practical domain wherein group-level official restrictions can be seen to have normative effect.

Lastly, and most straightforwardly, such positions can speak to conceptual viability of those systems of law that purport to employ sufficient criteria of validity. As such, they are able to give credence to the law of Saudi Arabia, where Article 7 of *The Basic Law of Governance* asserts that:

> Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State.[151]

That is, it can make sense of the idea that this constitutional statute reifies the Shari'ah

[151] King Fahd Bin Abdulaziz, "Royal Decree Embodying the Basic Law of Goverance" Royal Embassy of Saudi Arabia, Washington D.C. http://www.saudiembassy.net/about/country-information/laws /The_Basic_Law_Of_Governance.aspx

code as the terms of this state's domestic law, irrespective of the nature of its facto legal practice. To be clear, the point here is just that any theoretical model that precludes the existence of this sort of legal mechanism fails to speak to the full range of normative capacities that the law boasts for itself. Thus, insofar as traditionalist neo-Hartian accounts can recognize this kind of normative instrument, and Giudice's position cannot, they clinch one final dynamic advantage.

Given these points, it seems clear that traditionalist neo-Hartian positions can point to a descriptive-explanatory domain in which their theories are superior to competitors such as Giudice's. However, an awareness of this success should be tempered by the thought that there is a significant difference between offering a better account of some phenomenon than one's peers, and proffering the correct understanding of it. And this is where things can get tricky for those contemporary scholars who endorse something like the original Hartian understanding of the rule of recognition. For, it is not clear that such positions can provide for an optimal descriptive-explanatory account of the dynamics of law, at least as it exists today.

In order to appreciate this point, it is necessary to recall that those who assert that the rule of recognition establishes the terms of law in a polity thereby hold that validity criteria can only be reified – authoritatively established and maintained within the normative framework of law – insofar as they are accepted and practiced by the body of officials. Now, from a purely sociological perspective this assertion might seem quite innocuous. For, it is all but a truism that those who administrate over the law will have the final word as to whether some criterion of validity is given institutional effect or not. However, from the perspective of analytic-jurisprudence, things are not nearly so clear. For, the idea that the basic terms of law are only established and sustained on that basis is in obvious tension with the constitutional practices of a plethora of contemporary legal systems.

To understand how this is so, it is helpful to begin by attending to certain aspects of *The Basic Law for the Federal Republic of Germany*. In the preamble to this statute, it reads:

> Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.[152]

The issue here is that German law is written as though some of its most basic terms of validity have been established within the normative framework of law via their inclusion within a formally enacted constitutional document. Thus, its content appears to be in tension with the traditionalist neo-Hartian idea that the conditions of legal validity are established and maintained by the inclinations of the body of governmental administrators.[153]

In further support of this idea, one can turn to Section 20 (4) of the *Basic Law*, which states that:

> All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.[1]

Here, the German constitution actually includes an emergency provision pertaining to a potential set of circumstances where the administrators of government have turned against its requirements. For, this ascription of rights to be sensible at all, one must accept the premise that the bindingness of this content is a matter of its enactment and not of its official acceptance and practice.

Now, was the substance of the German legal system atypical or nonconformist, traditionalist neo-Hartians might be able to brush off these problematic statutes as mere eccentricities and claim that their work is not in tension with the normal or prevailing understanding of the grounds of law. However, the idea that phenomena outside of

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[152] "Basic Law for the Federal Republic of Germany" Deutscher Bundestag http://www.bundestag.de/htdocs_e/documents/legal/index.html

[153] Ibid.

official custom can be possessed of the power to create and sustain validity criteria is both fundamental to, and widespread within, modern legal practice. First, consider the preamble to Constitution of the United States, which states:

> *We the People of the United States*, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, *do ordain and establish* this Constitution for the United States of America.[154]

Here, the seminal example of modern constitutionalism can be seen to be explicitly premised upon the idea that it is the citizens of the state, and not legal officials, who are imbued with the power to "ordain and establish" the terms of law as they see fit. What is more, this idea has been accepted the world over, in legal systems as far flung as Canada, South Africa, and the Philippines. Indeed, the very concept of democratic rule, upon which these systems of law are premised, appears to be in tension with the idea the body of legal officials always determines the content of a polity's validity criteria. For, as Wilfrid Waluchow notes, at its heart:

> Democracy means that the people are in some way ultimately responsible for determining the laws and regulations by which they are governed, not a king or queen as in monarchy, or a group of elites as in oligarchy.[155]

Given these considerations, traditionalist neo-Hartians appear to face a serious descriptive problem. For, their understanding of law limits the possible wellsprings of validity criteria in a way that impugns the coherence of a huge amount of legal practice as well some of the most important political discourse underwriting it.

To be sure, none of this is to say that this group of scholars is left completely unable to speak to these alternative depictions of the grounds of law. For, manifest in the Hartian

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[154] "Constitution of the United States" *United States Senate* http://www.senate.gov/civics/constitution_item/constitution.htm. My emphasis.

[155] Wilfrid Waluchow, *A Common Theory of Judicial Review: The Living Tree* (Cambridge: Cambridge University Press, 2006) at 9.

literature is a distinction between the source of the content of validity criteria, and the font of their legal existence.[156] With an eye to this distinction, Hartian scholars can readily accept that the content of a legal system's validity criteria might be supplied by a constitutional document, or the determinations of the public will, while still maintaining that those standards only gains traction within the normative framework of law insofar as they are accepted and practiced by the body of legal officials.

However, this is not a particularly satisfying way of speaking to the present concern. For, the descriptive issue at play pertains to the way in which validity criteria are incorporated and sustained within the normative framework of law, and not how they find their content. In short, constitutional enactments such as the German *Basic Law* are not put forward as a source of non-binding content that depends upon official uptake for its legal standing. Rather, as has been noted, such statutes generally purport to have been legally reified by some non-official agency, such as a sovereign people. Thus, insofar as traditionalist neo-Hartians remain committed to the idea that the existence of validity criteria is always determined by their official uptake, they have no way to explain how this might be possible. As such, it is fair to ask whether these scholars have provided the best dynamic account that legal theory can achieve? Or might it be possible to provide for a descriptive-explanatory framework that is more sensitive to these aspects of the practice and the political ideology of modern constitutional law?

If the above considerations are correct then there is at least one significant set of dynamic legal practices that cannot be explained from within the traditionalist perspective. However, it is not the only one. And, what is more, it may not be the most theoretically problematic. For, it will now be argued that the traditionalist brand of neo-Hartian legal theory is in tension with the very rationale of modern constitutionalism

[156] This distinction is as old as Hartian positivism itself. For, Hart asserted that a legal system "contains an ultimate rule of recognition and, in the clauses of its constitution, a supreme criterion of validity." See *Concept of Law*, 103. Within contemporary literature this statement has been interpreted to mean that: "... the rule of recognition is not to be identified with the constitution but with the practices of recognition that are expressed when the constitution is applied." See, Green, "The Concept of Law Revisited", 1706.

itself. Specifically, it is incommensurable with the idea that the legal power of government can be limited.

To explain this point, it is important to begin by noting that there are a wide variety of manners in which different legal systems have historically purported to restrict the powers of their legal officials. Thus, there is nothing intrinsically unsettling about the idea that in some instances, governmental administrators might find themselves in a position of authority over the boundaries of their own legitimate practice, as per the traditionalist neo-Hartian account. However, it is also obvious that a great many legal systems have moved to curb the body of legal officials from exercising anything like that degree of control over the terms of their own legitimate practice. It is here that entrenched constitutional law finds its distinctive institutional role. For, contemporary polities not only purport to enact the ultimate terms of legal practice (as discussed above); they claim to be able to do so in a way that is insulated from changes that might later be brought about by shifts in official attitudes and behaviors. Indeed, in the most extreme cases, the law is constructed in a way that is meant to resist the possibility of ever being changed, under any conditions, by anyone.[157]

The problem for traditionalist neo-Hartians, then, is that on their account entrenched restrictions over the terms of legitimate official practice are incoherent. For, given that official acceptance is what determines the content of a legal system's terms of validity, there is no amount of juridical dicta or statutory posturing that can prevent the conditions of legitimate legal practice from shifting. Thus, contemporary proponents of Hart's

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[157] As an example of this phenomenon, Article 374 of the Honduran Constitution reads:

> It is not possible to reform, in any case, the preceding article, the present article, the constitutional articles referring to the form of government, to the national territory, to the presidential period, the prohibition to serve again as President of the Republic, the citizen who has performed under any title in consequence of which she/he cannot be President of the Republic in the subsequent period.

"Constitution of Honduras – English Translation", *Honduras.com*: http://www.honduras.com/honduras-constitution-english.html

conception of the rule of recognition find themselves at odds with a most fundamental tenet of legal dynamics: the capacity of the normative framework of law to establish group-level restrictions which are insulated from the effect of shifts in official attitudes or behavior. As such, they cannot give credence to the widely accepted idea that entrenched constitutions are able offer their subjects a "guarantee" as to the terms of legitimate legal governance.[158]

Now, in response to this charge, the neo-Hartians might push back by speaking to two related points. First, it is open to them to argue that even if their position does not perfectly accommodate the idea of entrenched legal limitations, it actually reveals a great deal about the underlying workings of law. Specifically, such accounts expose just how precarious the purported normative restrictions of constitutional law actually are. After all, no matter how impervious to change constitutional enactments are constructed to be, they require the acceptance of officials to facilitate their institutional implementation. Thus, the fact that neo-Hartians are unable to theoretically accommodate certain kinds of group-level restrictions is compensated for by their ability to illustrate the de facto realities of constitutional governance. Second, they might play upon the practical reality of law even further, by arguing that in cases of widespread official abuse there is very little sense in thinking that any sort of a legal restriction remains at play. That is, when validity criteria *qua* group-level restrictions fail to govern the terms of legal practice, why think that they warrant being modeled in an account of positive law at all? Surely, in such circumstances these standards amount to nothing more than abandoned norms, or "dead letter" law?

In regard to the first point, one can readily admit that any good theory should bring attention to the de facto realities of legal practice, and that the neo-Hartians should be

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[158] For an example of this sort of language in play, again consider Section 1 of the *Canadian Charter of Rights and Freedoms*, which reads:

> The Canadian Charter of Rights and Freedoms *guarantees* the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. (My emphasis.)

lauded for their efforts to do so. However, this does not void the descriptive duty to theoretically represent and explain the myriad forms of normative control that legal systems invoke as a means of guiding and corralling their administrators. Thus, the fact that traditionalist scholars attend to the practical boundaries of legal governance does not serve to offset the fact that their work is descriptive-explanatorily suboptimal – that it would be outdone by an account that could accommodate *all* of the relevant considerations: both the actual contours of legal governance, as well as the whole spectrum of normative mechanisms meant to guide and control it.

As for the second argument, it must be admitted that there is something to be said for the idea that official deviations from a set of validity conditions can be severe enough to make those standards of legality irrelevant, no matter how normatively entrenched they may be. However, it is dubious that all that is required to reach this terminus point is for the officials of a state to fail to accept and practice them. To appreciate why this is so, consider the following example: suppose that, in order to provide a veneer of legitimacy to their activities, a polity's body of governmental administrators constantly portrays the exercise of their institutional powers as occurring under the aegis of some specific normative framework. Further, suppose that this group does not actually recognize that normative system to be representative of the proper terms of governance. Rather, they use it as a rhetorical instrument to appease the people over whom they govern. As such, they do not actually adjust the de facto terms of its institutional practices to accord with it. In this situation the body of governmental administrators are not being guided by the ostensible validity criteria, and yet its terms are still playing a paradigmatically legal role: they are being used as a warrant – albeit unsoundly – for the institutional practice of government. What is more, the official use of those criteria as a warrant for action actually places legal administrators in a position where they are made voluntarily subject to the very terms of validity that they neither accept nor practice. That is, they can be called to the carpet for failing to live up to their own claims to be acting under the auspices of the criteria they espouse. As such, there is good reason think that entrenched group-level restrictions are a recognizably legal phenomena and, *ipso facto*, worth

accommodating within descriptive-explanatory accounts of law. Consequently, it is once again worth asking whether traditionalist neo-Hartians really are offering the best possible account of legal dynamics? Or, might it be possible to understand the law in a way that admits of the potential capriciousness of institutionalized governance without thereby being committed to holding that entrenched group-level official restrictions, and therefore the idea that the legal power of government can be limited, amounts to nothing more than a rhetorical façade?

To conclude, it has been established that traditionalist neo-Hartian theories face a descriptive-explanatory deficit regarding their ability to model non-customary sources of validity criteria. It has also been determined that such models cannot adequately account for the existence of entrenched group-level official restrictions and the idea of constitutional guarantees that such restraints support. As such, it is clear that these sorts of theories do not offer a wholly satisfactory theoretical representation of the dynamic element of contemporary legal practice.

With this conclusion in the bag, the current discussion is now complete. The thrust of this section was to assess the more traditional approaches to contemporary Hartian scholarship. More specifically, it was to investigate the structural and dynamic capacities of this group of theories as a whole. On the one hand, this inquiry determined that all traditionalist neo-Hartian accounts allow for significant structural faults to exist within their theoretical representation of the law. While, on the other, such positions represent an improvement over the work of scholars such as Giudice, with regard to their ability to model its dynamic capacities. However, even on the dynamic front, there is clearly room for descriptive-explanatory improvement.

2.4 The State of Play

With these observations in mind, it is time to turn back to the question that motivated this inquiry: just how successful is Hartian positivism in speaking to both the structural and dynamic elements of law?

To put it bluntly, this position appears to be in trouble. For, on the face of it, rule-based positivism's different incarnations all appear to be torn between accommodating the structural and dynamic features of law. That is, while Giudice's conception of the rule of recognition manages to rather precisely capture the terms of a polity's legal governance, it faces significant failures within the analysis of the law's normative aspect. Whereas, more traditionalist neo-Hartian understandings of law allow for some structural shortfalls, in order to do a passable, but not perfect, job of modeling legal dynamics. The result of this state of affairs is simple and important: while Hartian positivism may be the first theory to transcend the legal philosophers' dilemma in a way that captures the unity between the social and normative aspects of the law, none of its interpretations appear able to comprehensively model the whole variety of elements at play within the institutional realization of this phenomenon.

2.5 Conclusion

The point of this chapter was to reveal the problem with contemporary legal positivism that is responsible for stimulating the current project. With that in mind, the discussion moved to highlight the historical importance of being able to theoretically model both the structural and dynamic components of legal practice. Next, it briefly canvassed the capacities of H.L.A. Hart's own conception of legal positivism, with its focus upon the rule of recognition. This survey resulted in some surprising conclusions regarding the ostensible existence of certain structural failures suffered by Hart's original theoretical model. In light of these results, the chapter became dedicated to the pursuance of a much more detailed analysis, which was more specifically focused upon how well contemporary incarnations of Hart's position manage to represent the structure and dynamics of law. After analyzing the two predominant ways in which Hart's theoretical descendents have come to construe his position, the conclusion was unambiguous: this brand of positivism, in all of its forms, faces some daunting descriptive-explanatory challenges. This result brings two important questions to the fore. First, just what is it

about the nature of Hartian legal theory that makes its various interpretations susceptible to such problems? And, second, are there any theoretical adjustments that can be made in order to remedy them?

Chapter 3:
Overcoming the Hartian Deficit

Where the last chapter was meant to explicate the descriptive-explanatory predicament facing Hartian legal theory, this one will focus upon how modern positivists can transcend that state of affairs. To begin, it will be argued that the current quandary is due, in large part, to a particular structural feature of the Hartian account. With this in mind, the discussion will explore an attempt by Wilfrid Waluchow to redeem rule-based positivism by proposing a certain theoretical reconfiguration of it. After this exposition, it will be argued that while Waluchow's work does secure a degree of descriptive-explanatory improvement over its predecessors, it cannot completely exonerate the Hart's theoretical approach. Consequently, it will be suggested that the time has come for legal positivists to look beyond the Hartian understanding for an account of law that can better fulfill the requirements of the analytic project. In order to make good on this proposal, the rest of the chapter will be dedicated to sketching out an alternative positivist account of law – one that can overcome the descriptive-explanatory failings faced by Hart and his successors.

3.1 An Initial Diagnosis

At the conclusion of the previous chapter, it was noted that the various contemporary incarnations of Hartian positivism seem forced into making a kind of trade-off between accommodating the set of structural or dynamic elements of law. The

question that motivates the current discussion is: why? Just what is it that prevents rule-based accounts of law from being able to accurately speak to both of these kinds of features of law and legal practice?

In order to answer this query, it is helpful to begin by highlighting a rather obvious point about the law. Namely, that it is a form of social behavior that is comprised of two distinct kinds of administrative operations. On the one hand, it is constituted by normative activities, whereby the institutionally legitimate terms of governmental practice are established and modified.[159] On the other hand, it also consists in the de facto governance carried out under the auspices of that abstract schema.[160]

An appreciation of this bifurcation allows one to recognize the possibility of there being an orchestral failure within the practice of law. That is, it raises the specter of there being a disjuncture between the terms of legal legitimacy and those of de facto legal governance. And given this prospect, it would seem incumbent upon legal scholars to construct their models such that they would be able to attend to the existence, the independence, and the interdependence of these distinctive legal orientations. However, Hartian positivism has historically been conceived of in a way that renders it incapable of providing for such a nuanced account of its subject. For, this brand of legal theory has been developed around the idea that the law is univocal. Which is to say that these scholars portray the law as though it is constituted by a single governmental orientation, rather than multiple, potentially competing ones.[161] To more specifically elucidate how

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[159] I use the phrase "institutionally legitimate" to reiterate that what is being discussed here are those standards that are created to guide the terms of legal administration, as opposed to some other set of social or moral norms.

[160] Now, in certain primitive instances of law, both of these undertakings might be realized via an identical set of activities. However, in most legal systems there is at least some degree of variance between the sets of behaviors that constitute these different phenomena.

[161] There are a couple of points to be made here. First, this is not to say that Hartians are alone in this commitment. Indeed, the bulk of legal scholars, of all stripes, portray the law in a univocal manner. Second, a commitment to the univocality of law does not equal or entail a commitment to the idea that everything that issues from the mouth of law is non-contradictory, or that it obviously shares a practical aim. It only

this theoretical commitment results in problems for Hartian legal theory, it is worth taking another look at the descriptive-explanatory failings of the contemporary incarnations of that position.

First, let us reconsider the work of Michael Giudice. As has been noted, this scholar meant to remedy the structural weakness of the Hart's original framework by retooling the rule of recognition so that it always and only attributes legal standing to those policies taken up at the level of de facto legal governance. Thus, insofar as Giudice portrays the law as univocal – insofar as he models it as a single substantive position - he is precluded from theoretically recognizing the binding force of any normative element that might be thought to restrict the terms of de facto legal governance. Consequently, he is prevented from doing descriptive-explanatory justice to certain dynamic features of legal practice, such as substantive tests of legal validity and the existence of group-level restrictions upon the body of legal administrators.

Second, think back to the plight of traditionalist neo-Hartians. Contra Giudice, this group of theorists means to give credence to both the governmental and normative orientations of law via a univocal account. Now, to the extent that these two sets of content overlap, the traditionalist perspective can represent them both – albeit not in a manner that theoretically recognizes this convergence. But, things really get tricky for the traditionalists when the substance of these two fields is at a variance. For, in such instances, their endeavor is forced into the position of trying to kill two birds with a single stone. As a case in point, remember that when traditionalist Hartians' claim that the rule of recognition can incorporate necessary conditions of legal validity, they are asserting that the terms of institutional legitimacy can be ultimately determinative of the content of law. Thus, given their commitment to univocality, when necessary conditions of validity are in play, such scholars are forced to deny positive legal status to any institutional operations that violate those conditions, no matter their governmental relevancy. What circumstances like this reveal, is that when the terms of legal legitimacy and de facto

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means that such problems are cast as existing framework that is holistic in its delineation of the orientation of legal governance.

legal governance are irreconcilable, traditionalist positions - insofar as they are univocal - are forced to model the content of law in a way that privileges one of these two sources of legal content over the other. And, insofar as some governmental or normative elements of legal practice are glossed over, a structural or dynamic limitation will have been realized.

If the above considerations are correct, then an initial diagnosis of the descriptive-explanatory problems facing Hartian theories of law can be reasonably made: namely, that such positions attempt to capture the terms of a multi-vocal phenomenon from within a theoretical framework that models it as though it were not. Given this conclusion, the question of treatment arises: specifically, is there any way to reconfigure the positivist position, such that it could better represent the multifarious nature of law and legal governance, and thereby give theoretical credence to the full set of structural and dynamic features of law and legal practice? In short, can there be a multi-vocal Hartian account?

3.2 Waluchow's Treatment

In order to respond to this question, the discussion will turn to a recent paper written by Wilfrid Waluchow. In the previous chapter this scholar was referenced for his association with the traditionalist neo-Hartian camp. However, for present purposes it is more important to appreciate that Waluchow is widely lauded for the philosophical acuity of his analysis of the structural and dynamic capacities of various positivist positions. For, it is his keen consideration of that subject matter which has led him to make a radical recommendation concerning the future of Hartian positivism.

Waluchow's proposal is contained within a work titled: "Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism".[162] To the attentive reader, this may be a surprising source, since it was earlier asserted that the content of the inclusivist/exclusivist positivist debate was outside the purview of the current work. However, within "Four Concepts", Waluchow argues as though those two positivist

[162] See n143 above.

camps endorse something roughly akin to Giudice's model of law, and the more traditionalist interpretations of the Hartian position, respectively.[163] With this understanding in mind, he claims that:

> ...each side of the Inclusive/Exclusive debate highlights and explains important aspects of legal practice for which no plausible theory of law can fail to account – *and does so reasonably well*. On the other hand, each side does a *less than stellar* job of highlighting and explaining other important aspects of legal practice for which no plausible theory can fail to account.[164]

In order to respond to this state of affairs, Waluchow begins by suggesting that the differences between inclusive and exclusive accounts can be explained by the fact that these camps have relied upon "crucially different notions of validity", according to which they model distinct, but equally important elements of law and legal practice.[165] Given this state of affairs, Waluchow argues that the obvious way to rectify contemporary positivism's descriptive-explanatory predicament is to develop a theory of law that can simultaneously speak to the "different concepts of validity at play in these debates…(one) which finds room for all of them".[166]

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[163] See his distinction between inclusive and exclusive facts, in Waluchow, "Four Concepts of Validity, 16-23. It must be noted that Waluchow offers a rather tendentious understanding of the difference between inclusive and exclusive legal positivism. For, there does not seem to be any feature of exclusive legal positivism that necessarily precludes such accounts from adopting a traditionalist interpretation of the rule of recognition, and realizing its dynamic benefits. After all, a commitment to the idea that moral standards cannot be members of the normative framework of law does not in any commit one to rejecting the possibility of necessary or sufficient criteria of legal validity.

This said, it must also be acknowledged that an earlier version of the current essay also played upon this faulty depiction of the divide between inclusive and exclusive legal positivism. Indeed, the arguments therein were presented as a means of resolving the debate between those two camps. See Matthew Grellette, "Legal Positivism and the Separation of Existence and Validity", *Ratio Juris*. 23 no. 1 (2010) 22–40.

[164] Waluchow, "Four Concepts of Validity", 4.

[165] Ibid., 7.

[166] Ibid. This line of approach is reminiscent of one taken up by Hart, when he attended to the theoretical gulf separating the work of the legal realists and the normative

Given the tenor of the current chapter, this line of reasoning is quite exciting. For one thing, it is clear that Waluchow shares in the belief that contemporary positivism faces a serious descriptive-explanatory predicament. But, more importantly, this understanding leads him to suggest that the proper course of theoretical action is to collect and redeploy the various interpretations of Hartian positivism within something like a multi-vocal account of law. Thus, Waluchow's work offers us a first look at such a theory, and at its descriptive-explanatory strengths and limitations. With this in mind, his proposal will be further explored.

In order to lay the groundwork for his account, Waluchow's first move is to demarcate the various descriptive-explanatory perspectives that he thinks are in play within contemporary analytic jurisprudence. The result of this undertaking is the identification of four distinct understandings of legal validity. Of these, one is roughly equivalent to Giudice's position, one is a traditionalist interpretation of the rule of recognition, and the other two pertain to different moral frameworks by which the law might be normatively determined or constrained.[167]

Now, despite the fact that Waluchow identifies four such categories, the current discussion will only focus upon his treatment of the first two of them: the explicitly Hartian concepts of legal validity. For, these are the theoretical perspectives that are of interest to the current project, as well the two upon which Waluchow focused the bulk of his energies within "Four Concepts". In their technical formulation, these two analytic paradigms are:

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jurisprudents, led by Kelsen. See, *Concept,* 89-91, where Hart concludes with the assertion that:

> One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence.

[167] The latter two conceptions of validity are tacked on at the end of Waluchow's discussion of the tension between inclusive and exclusive positivism. They loosely correspond to the demands of a Razian theory of authority, and an Aquinian understanding of natural law. Waluchow, "Four Concepts of Validity", 27-28.

> *Legal Validity as Existence (or Acceptance)*
>
> 1. *R* is officially accepted and practiced in legal system, *L*, as a norm which fully satisfies all systemic criteria of legal validity (both pedigree and merit based) included within L's rule(s) of recognition.[168]

And,

> *Systemic Validity*
>
> 2. *R* is officially accepted and practiced in legal system, *L*, as a norm which fully satisfies all systemic criteria of legal validity (both pedigree and merit based) included within L's rule(s) of recognition; and does, as a matter of (objective) fact, satisfy all such systemic criteria of validity.[169]

With these two analytic paradigms in hand, Waluchow's next move is remarkably simple. It is just to contend that the right way to model the law is to analyze legal governance according to both of these theoretical perspectives, and then simply array their outputs within a sort of two-tiered account of the content of law. Thus, if one were interested in the legal standing of a policy, one would first inquire as to whether it was "accepted and practiced as valid law", thereby assessing its institutional uptake.[170] With a positive response, one might then inquire as to whether the given policy actually satisfies the terms of systemic legitimacy.[171] One can attend to both of these things, Waluchow contends, just "so long as one is careful to recognize that different concepts of validity are at play in these descriptions, and so long as one is careful not to let them run into one another."[172] Through this sort of meta-theory, Waluchow combines the superior structural analysis that he associates with exclusive legal positivism together with the

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[168] Ibid., 27.

[169] Ibid. For the purposes of the coming discussion, Waluchow's inclusion of "merit based" requirements within this definition will be ignored, so as to prevent the conversation from being bogged down in elements of the inclusive/exclusive debate that draw attention away from the present set of descriptive-explanatory concerns.

[170] Ibid., 34.

[171] Ibid.

[172] Ibid.

powerful dynamic analysis that he attributes to inclusive legal positivism.[173]

Now, quite obviously, this approach is groundbreaking. For, Waluchow has recast the two dominant strains of Hartian positivism as equal components of a single over-arching theoretical framework. As such, he is able to espouse a position that can recognize and track the relationship between both the governmental and normative orientations of law and legal practice, even within those confounding situations where their content is at a variance. Thus, his approach stands as a direct response to the diagnosis arrived at in the preceding section of this chapter.

The question, now, is whether there is any way in which Waluchow's multi-vocal account hinders an accurate descriptive-explanatory analysis of law? To be very clear, the question at hand does not refer to the plausibility of multi-vocal accounts per se, but rather whether any of the idiosyncrasies of Waluchow's particular approach are problematic.[174] By way of answer, two concerns with Waluchow's approach will be considered. One of these will ultimately be determined to be benign, while the other appears malignant.

The first and more superficial problem with his position pertains to the nomenclature that Waluchow makes use of to refer to the terms of his meta-theoretical framework. To appreciate the problem here, one must recall that he describes the two analytical perspectives, at play within his schema, as being different "concepts of legal validity". One must also be aware that he makes no move to establish a lexical order amongst these paradigms. Thus, his work makes room for the existence of two, potentially competing, accounts of the terms of valid law – one grounded in the conditions of legitimate practice, and one in its de facto exercise.

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[173] This paragraph is as much exegesis as it is a paraphrasing of Waluchow's position. For, he speaks to the strength of his augmentation of Hartian legal theory via the medium of an ongoing analytic debate between Matthew Kramer and Kenneth Himma. For his own words on the benefits of adopting this position see his discussion at Ibid., 27-34.

[174] For now, the theoretical plausibility of multi-vocal accounts of law will be taken for granted. However, in the following chapter this idea will be made subject to rigorous challenge.

The problem with this result is that it is in tension with the how the concept of validity is normally deployed within legal practice and theory. Specifically, as H.L.A. Hart wrote, the term of "legal validity" is widely used to denote the "unique identifying mark" of the terms of legitimate governmental practice.[175] Thus, the fact that Waluchow describes his theoretical framework in a way that provides for multiple and competing ascriptions of this status, and the fact that it does not purport to offer a hierarchy amongst them, undermines the normal guidance function of legal validity. Thus, the way in which he describes the content of law stands in tension with the widely accepted role of a key legal concept.

Despite the legitimacy of this concern, it does not ultimately impugn the integrity of Waluchow's framework. For, the fact that he describes his model's various analytical perspectives as different "concepts of validity" appears to be nothing more than a matter of philosophical convenience. Which is to say that there is no obvious descriptive-explanatory ground that would be lost was this terminology to be replaced by something else. So, for example, if Waluchow were moved to re-describe "*Validity as Existence*" or and "*Systemic Validity*" as delineating the terms of existent or occurrent legal governance on the one hand, and valid legal governance on the other, his position would avoid the conceptual tension that pertains to making a multiplicity of validity ascriptions. What is more, it would seem to do so without altering the content or structure of his theoretical framework in any other way.[176] Thus, it seems, this first problem can be dealt with quite

[175] Admittedly, despite a clear theoretical and institutional role, there is a great deal of debate about just how precisely to understand the nature of this legitimacy. That said, any plausible understanding rests on the idea that a legally valid norm or action is distinguishable by its possession of some sort of force – be it psychological, social, institutional, logical, normative, moral, etc. For a short but helpful survey of a number of different interpretations of this concept, See, James Harris, *Law and Legal Science*, (Oxford: Clarendon Press, 1979) at Ch. IV.

[176] Two points here. First, this recommendation is based on a move made in my previous paper on the subject, wherein I discussed the prospect of "dividing legal existence from legal validity". See, Grellette, "Separation of Existence and Validity". Second, there is no doubt that many legal scholars will blanch at this suggestion on the basis that they think it is conceptually incoherent. That concern will be addressed directly in the following chapter.

easily.

With this benign concern now raised and considered, it is time to attend to the second problem with Waluchow's position - the malignant one. In order to explain this issue, it is helpful to reiterate the predicament that Waluchow takes Hartian positivism to be faced with, and the nature of his resolution to it. On his understanding, exclusive legal positivism offers a satisfactory analysis of the terms of de facto legal governance, even as it fails to be capable of modeling a number of the law's normative features. Whereas, he believes, inclusive legal positivism can acceptably model the content of law's normative field, even while it can sometimes run into problems accurately tracking its structural reality. Thus, according to Waluchow, each of these theories is able to model something like half the descriptive-explanatory territory required of a plausible account. With this in mind, he offers a theoretical paradigm that is specifically designed to incorporate both of these analytic perspectives.

The problem with this approach is that it fails to overcome the whole spectrum of descriptive-explanatory failings properly attributable to Hartian legal theory. For, inclusive legal positivist accounts - as traditionalist interpretations of the Hartian position - are unable to adequately represent a number of law's more prevalent dynamic elements, including non-customary sources of validity criteria and entrenched group-level official restrictions.[177] The result of this oversight is clear. Insofar as Waluchow deploys something like Giudice's account of law to account for the "*Legal Validity as Existence*", his model is able to accurately track the terms of law's governmental field.[178] However, insofar as he relies upon a traditionalist interpretation of the rule of recognition to model the terms of "*Systemic Validity*", his position is prevented from comprehensively accounting for all the features of law's normative realm. Thus, even though he has managed to construct a multi-vocal framework, Waluchow cannot offer a satisfactory

[177] See, *Tried and True* in section 2.2 of the previous chapter.

[178] There are certain differences between my understanding of Giudice's account of law and the criteria that Waluchow identifies with the idea of "Legal Validity as Existence". However, these deviations do not result in a significant enough descriptive-explanatory variance to be worth exploring here.

descriptive-explanatory account of law and legal practice.

Given the verity of this latter criticism, there are a couple of important points that can now be readily appreciated. Specifically, it seems that the initial diagnosis of Hartian legal theory was underdeveloped. Now, this is not to say that the earlier assessment – which concerned the descriptive-explanatory failings associated with univocal accounts of law - was incorrect. Rather, the point is that even now, with Waluchow's multi-vocal account in play, the Hartian position can still be seen to be subject to another set of descriptive-explanatory failings. Specifically, it turns out that even in this more complex incarnation, rule-based legal positivism is plagued by an inability to satisfactorily account for all the normative elements of the law's institutional practice.

3.3 Leaving the Pale

With these considerations in mind, the tenor of the current chapter is going to change dramatically. For, it is now clear that, in order to overcome the descriptive-explanatory predicament detailed in the previous chapter, it is necessary to do two things. First, one must be able to offer a multi-vocal model that can track both the normative and governmental fields of law. Second, one must do so in a way that transcends the normative limitations that append to Hartian legal theory specifically. Consequently, it seems that, in order to right the positivist ship, something even more radical than Waluchow's work is called for. Thus, while the most advanced analytic models of law currently on offer are of the rule-based variety, it is time to go looking for something better. And, in what remains of the current chapter, this is exactly what will be attempted.

To be exceptionally clear: I do not mean to denigrate Hartian scholarship in any way. For, this body of work clearly stands as an ingenious contribution to the development of legal positivism and as the current bar within analytic jurisprudence. Yet, from a descriptive-explanatory perspective, it is sub-optimal. Thus, the current challenge is to try and proffer a more accurate model of law and legal practice than Hart or any of his contemporary disciples have mustered. But, what is more, it is to do so in a way that

does not derogate from the whole variety of analytical capacities that their work affords the modern philosophy of law.

This is, to seriously understate the point, a rather daunting proposition. After all, any such endeavor must not only be able to surpass Hartian theory in its ability to comprehensively and accurately track the governmental and normative orientations of law, but it must also be possessed of the same overall philosophical appeal. With the first chapter's historical discussion in mind, this means that a viable alternative must be capable of resolving the philosophers' dilemma. Which is to say, that it must be able to balance its delineation of the of law's social reality with an account of how legal norms exist as dependent imperatives. What is more, it must accomplish this feat in a way that does not rely upon anything like Kelsen's invocation of theoretical fictions. Finally, it must realize all of this within a theoretical framework that establishes the conceptual unity of its subject.[179]

Despite the intimidating stature of this list, I am convinced that there is a conception of legal positivism that can speak to all of the relevant considerations. And, in what remains of this chapter, I will do my best to elucidate it. To begin, I will provide the details of this alternative multi-vocal account of law. When this task is complete, the new model will first be tested for its descriptive-explanatory acuity, with special attention being given to those points of practice that problematize Hartian positivism. Afterwards, it will be judged in terms of its ability to realize the same philosophical appeal as its forerunner.

3.4 A Different Key, a New Account

In one of the earliest positivist works, John Austin argued that, "the term

[179] One might think that this list contains a notable absence: namely, the requirement to satisfy the positivist dogma. I consider that condition to be a part and parcel of comprehensively and accurately modeling the structural and dynamic elements of law's institutional practice. Thus, it should be understood to be included implicitly.

command…is the key to the sciences of jurisprudence and morals".[180] By this he meant that basing an account of law around the idea of a sovereign's commands would allow him to resolve the philosophical puzzles manifest within the study of law at that time. About one hundred and thirty years later, at the beginning of the modern positivist epoch, H.L.A. Hart repudiated Austin's claim and contended that if one wants to explain "the features of law that have proven most perplexing", then one is better served by attending to the various ways that social rules function within the normative framework of law.[181] With this in mind, he offered an understanding of the law that is grounded in the rule of recognition. In each of these two instances, the respective author sought to hail a paradigm shift within the philosophy of law by re-focusing scholarly attention upon what they took to be an under-theorized element of legal practice.[182]

The current work will not go so far as to suggest that there is some single theoretical key to all the conceptual puzzles at play within analytic jurisprudence. For, the diversity of these philosophical entanglements is simply too extreme to admit of a panacea. This said, the forthcoming discussion is premised upon the idea that there is a certain, hitherto underappreciated, feature of legal practice that can be used to underwrite a multi-vocal model of law that is capable of succeeding Hartian legal theory. More specifically, an account will be proffered that is grounded in the fact that legal governance is a warrant-based activity; that, whenever legal administrators act as such, they rely upon an institutionally established normative framework as a means of explaining and legitimating their governmental practices. While such an approach might seem somewhat impertinent, insofar as it suggests that there has been an important oversight within the history of legal philosophy, the theoretical significance of this particular feature of legal practice will come to be revealed over and over again in what follows.

The proposed legal model will be comprised of two descriptive-explanatory

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[180] Austin, *Province of Jurisprudence Determined,* 6.

[181] Hart, *Concept of Law,* 81.

[182] Of course, it turned out that, at least in Austin's case, the existence of the relevant practice was dubious. See, *Concept of Law,* ch. 1, where Hart challenges the plausibility of this idea.

paradigms, which will be used to represent the governmental and normative orientations of law respectively. With this in mind, the coming discussion will be broken into three short segments. The first will detail how the proposed model will move to track the de facto structure of legal governance. The second will explicate how it will identify the terms of institutionally legitimate legal conduct. While the third will be used to frame the relationship between these two analytical perspectives, thereby completing the delineation of the proposed model of law. As a methodological aside, it is worth noting that Hartian legal theory will often be relied upon to provide some theoretical context within the elucidation of these points.

Law's Governmental Orientation

In order to proceed with the first segment of this proposal, it is helpful to think back to a discussion that took place within the analysis of Michael Giudice's work. Therein, it was argued that to accurately model the structure of law, one's theory must ascribe legal standing to those practices and policies that the body of governmental administrators treats as being legitimated by an institutionally established normative framework; one that delineates the terms of proper governance in the relevant community. It was further noted that Giudice's theory makes attributions of legality in precisely this manner. Thus, the identifications of law that emerge from his position just are what is required of a satisfactory model of de facto legal governance.[183]

Now, while it is true that the current undertaking is meant to delineate a new theory of law, this aspiration does not entail any sort of commitment to completely reinventing the philosophical wheel. Rather, this work has always been meant to stand upon the shoulders of giants, especially those of Hart and his disciples. And, nowhere will this be clearer than in the present case. For, rather than trying to compete with Giudice's obviously successful structural approach, the current model will follow in Waluchow's footsteps by basically co-opting it as the means through which to account for the de facto

[183] See Section 2.2.1 in the previous chapter.

terms of legal governance.

This, of course, might come as something of an unexpected maneuver. For one thing, the current endeavor is meant to improve upon the descriptive-explanatory capacities of Hartian positivism. But, surely there is at least a prima facie reason to be suspicious of theoretically incorporating a significant component of the very sort of account over which one seeks to advance, let alone an entire interpretation of it. For another thing, it has been claimed that the model being proposed is supposed to be grounded in the fact that legal practice is warrant-based. Yet, Giudice's work makes no explicit mention of that phenomenon. Thus, integrating his framework into the current model appears to be at odds with the tenor of the current undertaking.

In order to overcome the first of these potential misgivings, it is helpful to recall that the descriptive-explanatory failings associated with Waluchow's multi-vocal interpretation of Hartian positivism were held to be the result of defects pertaining to its representation of law's normative orientation. However, this is not the legal content that it deployed Giudice's position to model. Rather, Waluchow relied upon that approach to track the terms of de facto legal governance. And, as was noted earlier, it succeeded admirably at that task. Thus, so long the present account only uses upon Giudice's framework to delineate the law's governmental orientation, then the incorporation of that position would appear to be a beneficial theoretical addition rather than a descriptive-explanatory liability.

On the other hand, in order to appreciate how it is that Giudice's framework is compatible with a theory grounded in the warrant-based nature of legal practice, one need only remember that his position relies on the idea that the terms of law are to be identified with those standards that governmental administrators treat as having been legitimated by an institutionally established normative framework. For, upon the briefest of reflections, it is obvious that this just means that he identifies the law with those practices and policies that legal officials treat as being institutionally warranted.

This said, Giudice's account will be made subject to certain adjustments as a matter of its incorporation within the newly proposed legal model. For, his position explicates

the authoritative structure of law via the customary nature of shared institutional practices. As such, he persistently couches its articulation with references to Hart's rule of recognition.[184] However, that mechanism involves certain conceptual baggage that new model seeks to jettison. Thus, its representation of law's governmental orientation will exclude that most Hartian of furnishings.

To conclude, like Waluchow's work, the proposed account of law's governmental orientation will integrate the substance of Giudice's position. That is, it will identify the de facto terms of legal governance with the practices and policies that governmental administrators treat as being warranted by an institutionally established normative framework. However, unlike Giudice's original account, and Waluchow's adoption thereof, the current endeavor will maintain its distance from any explicitly Hartian associations, by refusing to identify this strategy with the centerpiece of that position: the rule of recognition.

Law' s Normative Orientation

With this account of the law's governmental orientation in hand, it becomes possible to appreciate a new and quite natural manner of modeling the law's normative domain. For, the proposed schema seeks to identify the de facto terms of law via reference to the practices and policies that the body of legal officials treats as being warranted by an institutionally established normative framework – one that is promoted as identifying the terms of legitimate governance. As such, it renders the terms of legal government intrinsically subject to being evaluated on the basis of whether they are in fact authorized by the normative framework that they are purported to be. With this idea in mind, an obvious way to demarcate the terms of legal legitimacy in a given case would to identify it with the content of the normative framework that the body of legal officials

[184] See Giudice, "The Regular Practice of Morality in Law", "Existence and Justification Conditions of Law", and "Unconstitutionality, Invalidity, and Charter Challenges".

makes reference to within its institutional warrant-claims. And, indeed, the second-tier of the proposed multi-vocal account of law will do exactly that.

In order to be as clear as possible about the nature of proposal, it is worth attending to a few disparate points. To begin, it is helpful to contrast this new understanding of law's normative orientation with the Hartian position that Waluchow endorses. On his rendering, this content is delineated by reference to a traditionalist interpretation of the rule of recognition.[185] And, this means that it is supposed to be identified with whatever criteria of legitimate governance the body of legal officials collectively accept and realize within their practices. On the other hand, on the model being proposed, these criteria are to be determined via reference to the content of the normative framework that these agents invoke to institutionally legitimate their governmental activities. A key difference here is that, on the Hartian understanding, the body of legal officials is always able to determine the content of law's normative orientation in an unmediated way. That is, whatever their governmental predilections are so are the terms of institutional legitimacy. However, on the proposed alterative, those criteria are identified with the normative framework that legal officials explicitly rely upon to supply their institutional warrants. And, this is true irrespective of the attitudes and the actual terms of governance realized by those agents.

On a different front, the alterity of the new model's theoretical focus has significant implications for understanding how legal officials might alter the terms of law's normative orientation. For, if the normative framework, referenced by legal officials, is understood to possess ontological sway over the terms of legitimate governance then a change to those conditions could only be realized in one of two ways. On one hand, the terms of institutionally legitimate governance can be self-reflexive. As such, they can include provisions for their own legitimate alteration. When this possibility is realized, governmental administrators are able to alter the law's normative orientation by engaging in the procedures for change contained therein. On the other hand, governmental administrators might bypass the terms of legitimate change by switching the normative

[185] Waluchow, "Four Concepts of Validity", 27.

framework that they rely upon for their warrants. While possible, such a move would be incredibly radical insofar as it amounts to the explicit official abandonment of one understanding of institutional legitimacy in favor of another.

Now, up to this point, the newly proposed account of law's normative orientation has been described in rather abstract terms. Thus, the reader might well be wondering just what specific content this model would actually end up identifying it with. In order for this to be illuminated, one need only look at the kinds of normative frameworks that legal officials actually invoke to provide institutional warrants for their activities. The fact is that they make reference to what we think of as constitutional frameworks, understood in their minimal sense as the complete set of norms "creating, structuring and defining the limits of government power or authority".[186] In very simple legal systems, this can amount to a bare listing of rules, such as the Code of Hammurabi. Whereas, within the modern nation state, the schema deferred to can be significantly more complex. For example, when Canadian legal officials claim warrants for their activities, they understand themselves to be invoking a system of norms comprised by an entrenched constitution, a body of legislation, a developed common law jurisprudence, as well as certain commitments within the international community. With this in mind, it should be clear that despite the rather abstract manner of its formulation, this alternative account precisely identifies the normative content of law, and this is true regardless of whether one is investigating the terms of a primitive or a modern legal polity.

By way of summary, the second-tier of the multi-vocal account being proposed is meant to delineate the abstract terms of legitimate legal practice. And, it does so via reference to the content of whatever legitimating framework the body of governmental

[186] Wilfrid Waluchow, "Constitutionalism", in Edward N. Zalta, *Stanford Encyclopedia of Philosophy* (2010) http://plato.stanford.edu/entries/constitutionalism. Now, it is often the case that within particular instances of governmental activity legal practice officials will only explicitly identify a particular legal statute or point of common law reasoning. However, it is always understood that these specific standards are, themselves, underwritten by the existence of a normative framework that legitimates them, and to which the administrators of de facto legal governance are thereby made subject.

administrators relies upon as a warrant for its institutional activities. Thus, unlike the first tier of the proposed multi-vocal account, this analytical perspective marks a definite point of departure from the terms of Waluchow's multi-vocal approach, and the Hartian theory that underwrites it. But, what is more, it does so in a way that is not estranged from the nature or content of legal practice.

The Product

With these new interpretations of the governmental and normative orientations of law in hand, the contours of the proposed alternative to Hartian legal theory are becoming clearer. However, in order to finish its initial delineation, an explanation of how this model describes and substantively renders the relationship between those two legal fields must be provided.

To begin, this multi-vocal account of law will be framed by a conceptual distinction between the legal states of *occurrence* and *validity.*[187] On the one hand, it will attribute the status of occurrent law to the content of law's governmental orientation. While, on the other hand, it will identify the content of law's normative field with the criteria used to assess a standard's legal validity. Characterized in this way, the structure of the proposed model can be summarized within the following propositions:

1. A practice or policy is rendered legally occurrent when the body of governmental administrators treats it as being legitimated by an institutionally established normative framework, meant to delineate the terms of proper governance.

2. The terms of legal validity – of institutionally legitimate governance - are to be identified with the content of the normative framework that

[187] This, of course, is being pursued as a reaction to the benign criticism of Waluchow's work. See above at 77.

> the body of governmental administrators relies upon as a warrant, within its occurrent legal practices.

It is with an eye to this framework that the discussion will now explore some of the key elements within warrant-based legal theory's treatment of the relationship between law's governmental and normative orientations.

To begin, it is worth noting that Hartian scholars have always modeled the law such that a rule can only realize legal standing when it satisfies the conditions of legal validity.[188] Thus, as Joseph Raz states, a "rule which is not legally valid is not a legal rule at all. A valid law is a law, and invalid law is not."[189] However, things are rendered quite differently within the account being detailed here. For, this framework does not make satisfying the criteria of legal validity a condition of legal occurrence. Thus, unlike Hartian positivism, it allows for a governmental practice or policy to achieve legal standing even if it fails to be valid.

Now, while this understanding of law does not hold that a standard's legal occurrence is ontologically dependent upon its legal validity, it does place these two legal states into a distinctive relationship. For, while the existence of occurrent law is not determined by its amenability with the terms of legal validity, its normative standing is. This is to say that valid occurrent law is held to be capable altering or extending the terms of legitimate institutional governance by conferring rights, imposing duties, affording protections, creating offices etc. On the other hand, occurrent law that is invalid is held to be normatively inert. From the perspective of institutional legitimacy, invalid points of law are as inoperative as though they had never been rendered.[190] Given this understanding, within warrant-based positivism, the concept of legal validity is used to

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[188] As has been discussed, this is even true of Waluchow's multi-vocal interpretation of law, which deploys four different sets of validity criteria. See, Waluchow, "Four Concepts of Validity".

[189] Raz, *Authority of Law*, 146.

[190] It must be admitted that much of the language of this paragraph has been borrowed from Justice Field's colorful decision in *Norton v. Shelby County* (1886) 118 US 425, 422.

demarcate and patrol the boundary between institutionally sound and defective instances of occurrent law.

On a final, and somewhat different note, this new approach to legal theory also holds that terms of legal occurrence and legal validity share in a very distinctive procedural relationship. For, on the one hand, the proposed account holds that legally occurrent practices and policies only achieve their standing when the body of legal officials treats them as though they satisfy the conditions of legal validity. On the other hand, it identifies the terms of legal validity with the normative framework that is referenced within the practice of occurrent law. Thus, in a given polity, occurrent law can only be realized through reference to the terms of legal validity, and the criteria of legal validity are only realized insofar as they are referenced within the practice of occurrent law. Understood as such, the proposed account makes these two sets of legal content ontologically co-dependent.

Now, earlier in this chapter it was noted that a viable legal theory must recognize the existence, the independence, and the interdependence of the law's two orientations. A quick look back at the above discussion reveals that the proposed model of law does all of these things. It recognizes the existence of law's governmental and normative orientations via reference to the legal states of occurrence and validity. It respects the independence of those two legal orientations by allowing that a given practice or policy can be granted the status of occurrent law even if does not satisfy the conditions of legal validity. At the same time it counterbalances that independence, by holding that the terms of legal validity determine the institutional quality of occurrent law. Finally, it speaks to the to the interdependence of these two legal standings by holding them to be ontologically inter-reliant. With these points in hand, the earlier theoretical requirement can be seen to have been satisfied. And, as such, the provisional formulation of warrant-based positivism can now be considered complete.[191]

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[191] I say, "…provisional formulation", because the present illustration of this position is rather skeletal. On the one hand, only certain key elements of this position have been elucidated. Many more will be highlighted within the rest of this work. But what is more, there are a multitude of theoretical issues that are well beyond the scope

3.4 Squaring Off

Now that it has been delineated, it is clear that this new theoretical approach represents a novel development within analytic jurisprudence. For one thing, it stands as the only unabashedly positivistic multi-vocal account of law that has been proffered. After all, while Waluchow's model has been treated as a positivist work, only two of his four suggested concepts of legal validity are amenable with Austin's dogma. Whereas, on the current account, the terms of both occurrent law and legal validity are defined in a way that precludes moral considerations from independently effecting the legal status of a given practice or policy. For another thing, and much more importantly, warrant-based positivism is an attempt to redirect the analytic focus of legal philosophy. That is, rather than honing in on the commands of a sovereign, or the beliefs or attitudes of legal officials, the proposed framework identifies both the terms of legal existence and legal validity through reference to the fact that the body of legal administrators inevitably relies upon an institutional warrant to legitimate their governmental activities. Thus, it represents a completely new approach to understanding the nature of law.

All this said, at this stage some readers might be tempted to point out that the ability to sketch out this new theoretical direction is not the same as demonstrating its theoretical viability. For, there are a wide range of possible criticisms and concerns that this theory must respond too in order to be properly established. And, this is certainly true. However, before turning to deal with some of those concerns, it is first worth verifying whether such an exertion would even be worthwhile. That is, this alternative approach to legal theory has been proffered in order to overcome certain theoretical pitfalls attributable to Hartian positivism. Thus, it only makes sense to make the effort of engaging with potential challenges of this position, if it is actually capable of doing the job that it is meant to. With this in mind, the remainder of this chapter will be dedicated

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and scale of this dissertation, which may eventually come to inform or alter the structure of the proposed model. For a few relevant examples, one need only note that this work has not taken an explicit stance on the possibility of legal pluralism or the precise way to demarcate the boundaries of a given legal system.

to determining whether the warrant-based model of law really is able to surpass the theoretical attractiveness of Hartian positivism, and thereby stand as a potential step forward within the domain of analytic jurisprudence, rather than a move sideways or back.

In order to proceed with this evaluation, the assessment of warrant-based positivism will begin by comparing and contrasting this position's ability to accurately represent the structural and dynamic of law with that of its Hartian predecessor. Afterwards, the discussion will turn to investigate whether this schema is able to match the broader philosophical appeal of rule-based positivism, with special emphasis being given to its ability to offer a substantive account of how legal standards can be understood to exist dependent imperatives.

3.6 Warrant-based Positivism's Representational Acuity

In what follows, the descriptive-explanatory analysis of warrant-based positivism will be broken down into three component parts. First of all, it will attend to that position's ability to model the de facto structure of legal practice. Second, it will examine the proposed framework's ability to model law's basic dynamic elements. Specifically, its ability to i) portray a standard's validity as being a matter of its satisfying the terms of a substantive test, ii) explain how the law is capable of normatively binding legal officials at both the individual *and* the group level, and iii) theoretically accommodate both necessary and sufficient criteria of legal validity. Third, and finally, it will investigate this theoretical alternative's ability to account for the law's complex dynamic elements; those that were shown to create descriptive-explanatory problems for traditionalist accounts. That is, the ability to i) explain how it is possible for the terms of legal validity to be established in a way that is not ultimately grounded in official custom, as well as the capacity to ii) offer a plausible account of normatively entrenched group-level official restrictions.

Tracking the Structure of Law

The initial, and by far the easiest point of descriptive-explanatory analysis, regards the ability of warrant-based legal theory to accurately account for the structure of law. After all, by now, it is just a matter of reiteration to point out that in order to properly represent the terms of de facto legal governance, one's account of law must ascribe legal standing to those practices and policies that the body of governmental administrators treats as being legitimated by an institutionally established normative framework. And, it is no less a matter of rote to point out that these are the precise conditions by which the proposed model identifies the terms of de facto legal practice, under the heading of occurrent law. Thus, unlike traditionalist neo-Hartian positions, but very much like Giudice and Waluchow's accounts of law, this theory provides for an accurate appreciation of the terms of de facto legal governance.

Modeling the Basic Dynamic Elements of Law

With the structural acuity of the proposed model of law established, it is time to consider its ability to represent law's basic dynamic elements. The first of these points of assessment pertains to whether warrant-based positivism is able to portray ascriptions of legal validity as being a matter of satisfying some substantive test. The answer, in short, is that this is most clearly the case. For, as was noted earlier, its attributions of legal validity are reserved for those practices or policies that are amenable with the terms of the normative framework that governmental administrators deploy as their institutional warrant. To this extent, the warrant-based understanding of law appears to match the dynamic capacities of traditionalist interpretations of Hartian positivism. But, in fact, it achieves an even greater degree of success than this. For, this new approach does a better job of modeling certain elements of the juridical tests of legal validity, than its Hartian competition.

To see how this is so, it is helpful to return to H.L.A. Hart's claim that:

> 'This is a valid rule or law' said by a judge is an act of recognition; in saying it he recognizes the rule in question as one satisfying certain accepted criteria for admission as a rule of the system and so as a legal standard of behavior.[192]

In this statement, Hart contends that judges test the legal validity of rules via certain "accepted criteria" of systemic membership. This, of course is a reference to the rule of recognition - that most basic of legal standards.[193] What must be taken note of, however, is that, within modern legal practice, judges are generally loath to admit that there is any such *legal* rule underwriting tests of validity. That is, while they are willing to admit of the political influence that the collective attitudes of legal officials can have on the content of law, they rarely, if ever, portray this as the ultimate *legal* source of validity criteria. To the contrary, judges are often quite explicit in their identification of a polity's constitution as the highest level of legal authority. Thus, the Hartian identification of the rule of recognition as a "legal rule" is in tension with the surface-semantics of the courts, when they are engaged in testing the legality of a given practice or policy.[194]

On the other hand, warrant-based positivism completely legitimates this contour of judicial behavior. First of all, on this understanding of law, the content of a system's validity criteria is constituted by whatever normative framework the body of governmental administrators relies upon as a warrant for its institutional activities. As such, the new model does not invoke the idea of an ultimate legal rule of identification. Thus, it makes good sense of the fact that judges never portray tests of validity as being ultimately grounded in such a standard. But, what is more, this alternative account is also compatible with the idea that a nation's constitution stands as the highest legal authority. For, on this model, the structure of the legal hierarchy is determined by the content of

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[192] See, Hart, "Scandinavian Realism", 165.

[193] Hart describes this mechanism as a "secondary" legal rule.

[194] This argument serves to further gird the earlier assertion that contemporary legal practice is structured in a way that recognizes the constituent power of the constitution, and that traditionalist neo-Hartian accounts are ill suited to theoretically recognize this phenomenon.

whatever normative framework legal administrators deploy as a warrant for their governmental activities. Thus, if that group treated its institutional behaviors as being warranted by a normative hierarchy that terminates in a national constitution, then this just is the case. With these points in mind, it is clear that new brand of legal theory not only explains how attributions of legal validity are the result of certain substantive tests, it does so in a way that appears to give credence to the precise contours of contemporary juridical surface-semantics. Consequently, on this first point of dynamic analysis, it actually surpasses the descriptive-explanatory capacities of Hartian legal theory.

The next point of assessment regards warrant-based positivism's ability to explain how the law normatively binds its governmental administrators at both the individual and the group level. To reiterate, this account of law holds that when legal officials invoke the content of a normative framework as authorizing their governmental behaviors, they establish that system of norms as the terms of institutional legitimacy. Consequently, when a single governmental administrator engages in occurrent legal performances that are not supported by the content of the warrant that the body official treats it to possess, that conduct is rendered invalid and, hence, institutionally illegitimate. What is more, the result would be the same even were legal administrators to act en masse. For, no matter how widespread or persistent a governmental behavior is, if it is pursued under an unsubstantiable warrant then it is rendered normatively inert, from the perspective of law. Thus, this new approach to legal theory joins the more traditional Hartian approaches in being able to explain how both individual and group-level legal normative restrictions are realized within the institutionalized practice of law.

The final issue of basic dynamic competence regards the ability of warrant-based positivism to theoretically account for sufficient criteria of legal validity. As a reminder, this sort of normative mechanism is understood to realize a specific kind of ontological effect with regard to the content of law. Specifically, it was said to legally establish every standard that satisfies its requirements. And this is true, irrespective of whether legal officials happen to promulgate and practice those designated norms.

Now, before providing the details of how sufficient criteria of validity are

understood within warrant-based positivism, it must be acknowledged that this new approach will rely upon a slightly different understanding of that kind of normative mechanism than its traditionalist neo-Hartian interpretation. After all, as univocal accounts, those latter theories hold such criteria to inform the content of law's one, and purportedly, only institutional orientation. That is, they hold them to determine the content of law per se. However, on the proposed legal model, the law is held to be comprised of two institutional orientations. What is more, it portrays validity criteria as realizing different kinds of normative effects with regard to each of those fields of content. Thus, the new depiction of sufficient criteria of legal validity will be somewhat more nuanced than that of its theoretical predecessor.

To see how this plays out, it is helpful to begin by reiterating that, according to the warrant-based account, when validity criteria apply to law's governmental orientation they play an evaluative rather than an ontological role. That is, they determine the normative quality of the terms of occurrent law, rather than the membership of that set.[195] As such, the relationship between the terms of legal validity and those of occurrent law does not provide conceptual space for sufficient criteria of validity. Since, those mechanisms are defined by their capacity to actually create legal norms.

However, as was mentioned earlier, validity criteria do not only apply to the terms of occurrent law. For, they can also operate in a self-reflexive manner. Specifically, law's normative orientation can contain standards that are ontologically determinative of its own content.[196] It is here that the warrant-based model of law makes room for sufficient criteria. Since, it allows that the set of validity criteria can be possessed of, or be open to the incorporation of, norms that establish the existence of other members thereof.

To get a further sense of this alternative interpretation of sufficient criteria of validity, it is useful to refer back to the example of this sort of mechanism that was deployed in the second chapter. Therein, it was noted that Article 7 of Saudi Arabia's

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[195] Above, 91.
[196] Ibid., 88.

Basic Law of Governance asserts that:

> Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State.[197]

On the proposed understanding of sufficient criteria of legal validity, this constitutional article is held to establish the content of Shari-ah as criteria of validity within the Saudi legal system. As such, this enactment serves to reify all the elements of that doctrine as the requirements of legitimate legal governance. As such, it respects the legally creative role of sufficient criteria of legal validity, without purporting to have spoken about the contours of de facto legal governance. Consequently, this alternative depiction of law can be understood to equal the dynamic capacities of traditionalist Hartian accounts with regard to sufficient criteria of legal validity without taking on the risk of structural failure that those positions do.[198]

With this point of dynamic competence established, it is worth pausing for a moment to take stock of warrant-based positivism's descriptive-explanatory capacities. For, this account of law has been shown to reach an important theoretical milestone. Specifically, by being able to accurately represent the law's governmental structure, as well as all of its basic dynamic components, this alternative brand of legal positivism has outstripped the representational capacities of every Hartian position except Waluchow's multi-vocal account. In fact, if the arguments regarding the nature of substantive tests of validity are correct, then this position actually outperforms its predecessors on one point. Thus, at this early stage, warrant-based positivism is already beginning to look like a viable competitor with analytic jurisprudence's premier position. The question now, is how this new theory will fare with regard to those dynamic elements that created problems even for Waluchow's account of law, and whether it will truly come into its own.

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[197] "Royal Decree Embodying the Basic Law of Goverance".
[198] See above at 64-5.

Modeling the More Complex Dynamic Elements of Law

The first complex dynamic issue, against which warrant-based positivism will be tested, regards the fact that the surface-semantics and political ideology underwriting modern constitutional law suggests that validity criteria can be legally reified by non-official means. In the initial discussion of this issue, it was argued that traditionalist neo-Hartian accounts are problematized by this ostensible dynamic phenomenon. For, those theories hold that the legal existence of validity criteria depends upon whether they achieve and maintain official uptake. As such, the question of the moment is whether the newly proposed account of law is in any better of a position to theoretically respect those features of legal practice and discourse.

To garner an answer to this query it is helpful to take note of a couple of key features of the warrant-based understanding of law. First, this model identifies the terms of legal validity via reference to the normative framework that the body of governmental administrators relies upon to provide warrants for its institutional activities. And, second, this position does not place any restrictions on the substance or structure of those frameworks.[199]

With these points in mind, it is possible to see how this alternative approach to legal theory is able to respect the idea that non-official entities can be possessed of the power to create and sustain criteria of legal validity. For, insofar as warrant-based positivism does not place any substantive restrictions upon the normative orientation of law, it allows that the body of governmental administrators might reify a system of norms that grants non-official agents constituent legal power. So, for example, were officials to embrace a normative framework that granted such control to the collected members of a polity, and were that group to enact certain fundamental criteria of legal validity, then those standards would be established and maintained as legal norms in a way that does

[199] Or, at least, it is not committed to any such restrictions as of yet. Insofar as the current work will not engage with the inclusive/exclusive debate, the issue of whether the normative framework of law can include moral criteria is left hanging for the present time.

not require them to be accepted or practiced by legal officials. It is in this way that the alternative understanding of law can make sense of the surface-semantics and the ideology underpinning modern constitutional claims, such as the preamble to the American constitution. Which states:

> *We the People of the United States*, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, *do ordain and establish* this Constitution for the United States of America.[200]

Now, to be very clear, this explanation should not be taken to suggest that warrant-based legal theory disregards the sociological reality that underpins legal practice. That is, it does not seek to challenge the idea that those who administrate over the law will have the final institutional word as to the validity criteria that are at play within a legal system. Rather, it reveals how that influence is inherently mediated by the content of the normative framework that legal officials rely upon to supply their governmental warrants. For, as has been argued, it is in this way that one can account for how the privileged institutional position of governmental administrators is compatible with existence of normative domains within which non-official agents possess the capacity to legally reify validity criteria.

With this first success in hand, it is time to engage with the other complex dynamic element of law: group-level restrictions that are insulated from shifts in official attitudes and behaviors. Recall that the problem for traditionalist neo-Hartians is that on their account such entrenched boundaries over the terms of legitimate official practice are incoherent. For, given that official acceptance and practice is what determines the content of a legal system's terms of validity, there is no amount of juridical dicta or statutory posturing that can prevent the conditions of legitimate legal practice from shifting with the governmental inclinations of the body of officials. Thus, contemporary proponents of Hart's conception of the rule of recognition find themselves at odds with

[200] "Constitution of the United States",

the widely accepted idea that entrenched constitutions are able to offer their subjects any sort of a "guarantee" as to the terms of legitimate legal governance. As such, the predominant issue at play here is to determine whether warrant-based positivism can be seen to suffer from this same descriptive-explanatory limitation.

But, before revealing whether this challenge can be met, it is also necessary to remember that in the initial discussion of this phenomenon, it was concluded that any plausible legal theory must carefully condition the idea of such normative limitations. For, within the practice of law there will always be a point where the governmental deviation from a set of validity conditions can be severe enough to undermine their legality, no matter how normatively entrenched they may appear to be. Thus, the task facing warrant-based legal theory is more complex than simply explaining how entrenched group-level official restrictions are possible. It is to do so in a way that also recognizes the normative capriciousness of institutionalized legal governance.

The way that this alternative account is able to respond to this challenge is fairly straightforward. For, as has already been noted, this position allows that the law's normative orientation can contain standards that are ontologically determinative of its own content. Now, up to this point, the discussions regarding such phenomena have been focused upon rules meant to alter the terms of law, such as sufficient conditions of validity. However, the law's normative framework can also contain standards dedicated to hindering or even permanently preventing changes to its content. That is, it can include rules such as Article 374 of the Honduran Constitution, which reads:

> It is not possible to reform, in any case, the preceding article, the present article, the constitutional articles referring to the form of government, to the national territory, to the presidential period, the prohibition to serve again as President of the Republic, the citizen who has performed under any title in consequence of which she/he cannot be President of the Republic in the subsequent period.[201]

The reason for highlighting this fact is that, on the warrant-based account, there are

[201] "Constitution of Honduras – English Translation"

only two ways for governmental administrators to change the criteria of legal validity. First, they might alter the law's normative orientation by following procedures of change that are delineated therein. Or, second, they might bypass those criteria by switching the normative framework that they rely upon for their warrants. The upshot of modeling the law in this way is that when a validity criterion, such as the one above, successfully makes its way into the normative framework of law, it prevents any intra-systemic means of reforming the content that it identifies. Thus, unless legal officials are willing to take the rather radical step of changing the normative framework that they rely upon to provide their institutional warrants – unless they actually alter the identity of the legal system over which they administrate - then they will always be subject to the criteria of validity that such norms protect. Consequently, this understanding of law can admit of the capriciousness of the terms of law, insofar as it accords legal officials the ability to choose the normative framework that they defer to. However, it also makes sense of entrenched group-level restrictions by identifying them with those self-reflexive validity criteria that permanently determine the contours of the normative framework that legal officials actively rely upon to supply the institutional warrants for their governmental activities.

In this way, the newly proposed account of law can make good sense of the idea of constitutional guarantees, and of legally limited government more broadly construed. For, insofar as a government purports to act under the aegis of a normative framework that includes entrenched group-level restrictions; it is bound by standards that are non-negotiable. As such, warrant-based positivism is able to provide for a plausible understanding of these complex dynamic elements, and thereby outperform its Hartian predecessors.

With this conclusion in hand, the analysis of warrant-based positivism's structural and dynamic capacities has come to a close. For, this new multi-vocal position has been shown to model the structure of law in a way that properly tracks the de facto terms of legal governance. Furthermore, it can match, if not surpass, rule-based legal theory's ability to track the basic dynamic capacities of law. But, most importantly, it succeeds

where its predecessor failed: in offering plausible accounts of the more complex dynamic elements of legal practice. As such, this newly proposed account of law appears to be in a position to supersede analytic jurisprudence's premier theory account of law. All that remains to be seen is whether this framework is also able to match the broader philosophical appeal of Hartian legal theory.

3.7 Warrant-based Positivism's Philosophical Appeal

Before proceeding with this final segment of analysis, it is worth taking a moment to become reacquainted with some of the more abstract philosophical benefits of Hartian positivism. In order to appreciate these points, it is necessary to recall that on this model the terms of legal validity are meant to be identified with the criteria of systemic membership that the bulk of legal officials customarily make use of within their law-applying and law-identifying practices. Thus, on this account, valid legal rules must be sanctioned by a normative framework, which finds its source in the terms of official custom.[202] It is through reference to this phenomenon that Hartian theory is able to support a substantive, rather than a fictional, explanation of how it is that legal norms can be understood as dependent imperatives –as authoritatively sanctioned policies. What is more, insofar as this account is grounded in the existence of official customs that are said to necessarily attend the realization of institutionalized governance, it allows us to understand how the "is" and "ought" of law's social reality are woven together within its practice. The question of the moment, then, is whether the warrant-based understanding of law should be understood to boast anything like these philosophical advantages.

Now, one might presume that this alternative conception of law would simply ride the Hartians' coattails with regard to these considerations. Since, the warrant-based

[202] It is this phenomenon that I think helps to explain why Hart once claimed that a social rules, which operate via the force of custom, stand as the "master concept" of his work in the philosophy of law. See, David Sugarman, "Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman," *Journal of Law and Society* 32 (2005): 267-293, 282.

account holds that legal practice is grounded in the fact that governmental administrators collectively rely upon a specific normative framework as a shared governmental warrant. Thus, it appears to be compatible with the idea that the phenomenon of legal authorization ultimately depends upon the fact of an official custom. However, this will not and cannot be the path that is taken.

To understand why this is so, it is helpful to recall an example that was deployed in the previous chapter. Suppose that, in order to provide a veneer of legitimacy to their activities, a polity's governmental administrators constantly portray the exercise of their institutional powers to be occurring under the aegis of some specific normative framework. Further, suppose that this group does not actually recognize that normative system to be representative of the proper terms of governance. Rather, they only deploy it as a rhetorical instrument to appease the people over whom they govern. As such, these agents do not actually adjust the de facto terms of institutional practice to accord with the requirements of that schema. In these circumstances it would be dubious, at best, to suppose that the body of legal officials takes a critical reflective attitude towards the content of the normative framework that they are invoking. For, they simply do not accept that it is binding over their governmental practices. Thus, it does not seem that official custom could provide that set of standards any institutional authority.

Now, to be clear, such situations are fairly uninteresting with regard to Hartian legal theory. For, no interpretation of that position would accord legal standing to the normative framework that these governmental administrators falsely subject themselves to. However, things are different for the warrant-based approach. For, on this understanding of law the set of standards in question would be held to exist as the legal system's validity conditions. Consequently, it allows that there might be rules which satisfy the conditions of validity, but which are not supported by the terms of official custom. As such, it is incompatible with the Hartian account of how valid legal norms can be understood to stand as dependent-imperatives.

Fortuitously, however, the very situation that appears to problematize warrant-based positivism's reliance upon the Hartian interpretation of this phenomenon also helps

to uncover a different way of construing it. Since, while no official custom binds the legal officials in the above example, there is still a clear sense in which they engage in a normative violation. After all, when this body acts against the criteria of legal validity that they purport to be respecting, they are breaking their word. And, with this in mind, it is open to warrant-based positivism to offer an account of how legal standards are dependent-imperatives that is grounded in the idea that when an agent communicates their intention to engage in some set of actions they thereby identify a set of criteria against which their actions can meaningfully be judged. More specifically, the claim would be that when legal officials purport to govern in a way that respects the terms of an institutionally enacted normative framework; they actually establish that schema as the terms of institutional authorization.

Now, such a maneuver would obviously be amenable with warrant-based positivism's account of legal validity. But, there is a better reason to make this move than mere compatibility. For, taking this approach would place this new legal model in a position to match, if not surpass, the philosophical appeal of the Hartian position. To see how this is so, first consider that this maneuver would allow the warrant-based position to offer a substantive account of how legal standards count as dependent-imperatives. Thus, like Hartian theory but unlike the "philosophical jurisprudence of Hans Kelsen, it does not try to speak to that legal truism by invoking any sort of normative fiction.[203] Rather, again like Hartian theory, it provides an account of that phenomenon which is grounded in the sociological reality of institutionalized legal governance. As such, it too is able to demonstrate how the "is" and the "ought" of reality come together within the social practice of law. But, unlike the Hartian approach, warrant-based legal theory's explication of how valid legal standards exist as dependent imperatives is more in keeping with a widely recognized difference between legal and non-legal governance. That is, it speaks to quite ancient notion that the practice of law introduces a normative requirement over its administrators to adhere to the terms of governance that they have promulgated. As such, this alternative understanding of how legal standards exist as

[203] See above at 25 for more detail on this point.

dependent-imperatives allows the warrant-based position to match, and perhaps even surpass the philosophical appeal of Hartian positivism. Consequently, it will be endorsed herein.

With this result in hand, the descriptive-explanatory analysis of warrant-based positivism will now draw to a close. For, it has now been established that this alternative account of law has managed to exceed the representational capacities of Hartian positivism. But, what is more, this has been managed a way that balances those achievements with the ability to realize an equally advantageous degree of philosophical plausibility.

3.8 Conclusion

The point of this chapter was to understand and find a way to overcome the descriptive-explanatory challenges facing modern positivist thought. With this in mind, the discussion began by arguing that it was necessary to follow in the work of Professor Wilfrid Waluchow by offering a multi-vocal account of law. However, it was further contended that merely redrafting the structure of Hartian theory was not sufficient to remedy all of the relevant problems. As such, a new positivist theory of law was proposed, one that places its analytical focus upon the fact that legal practice is fundamentally warrant-based. This new account was then tested to see if could succeed where Hartian theory stumbled. The results, it has been argued, are very promising. Specifically, this alternative approach to positivist theory is able to account for the structure and dynamics of law in a way that surpasses Waluchow's model. And, what is more, it does so in a way that maintains, if not exceeds, the philosophical appeal of Hart's original formulation of rule-based positivism. Thus, this trip beyond the positivist pale has borne fruit. That said, it has already been admitted that the ability of warrant-based positivism to outdo the Hartian position on these descriptive-explanatory fronts is not the same thing as demonstrating its theoretical viability. For, there are a couple of potentially damaging concerns that must be addressed before this theory can be

considered a viable theoretical option. And, it is this task that will be taken up within the next chapter.

Chapter 4:
Girding Warrant-Based Positivism

If the arguments contained within the third chapter of this work are sound, then warrant-based legal theory is capable of transcending the descriptive-explanatory problems facing Hartian positivism even while it maintains, and perhaps improves upon, its predecessor's overall philosophical appeal. The point of the following discussion is to look beyond the terms of a direct theoretical comparison between these two legal models, in order to explore the viability of the newly proposed account in its own right. To this end, two distinct theoretical challenges will now be entertained in order to more fully establish that warrant-based positivism can stand as a plausible endeavor of analytic jurisprudence and, thereby, as a philosophically interesting interpretation of the nature of law.

4.1 The Independence of Legal Existence from Legal Validity

The first issue to be considered pertains to the theoretical implications of a certain analytical element of the warrant-based account. Specifically, some scholars might be suspicious of the fact that this model has been constructed in a way that has it recognize the positive legal standing of institutional practices or policies that are simultaneously identified as being institutionally invalid. After all, every positivist position in the last hundred years – from Hans Kelsen's normative jurisprudence to Waluchow's multi-vocal interpretation of Hartian legal theory - has taken something of the opposite approach,

insofar as they have modeled the law in a way that renders the legal existence of a standard dependent upon its validity. As such, it is worth investigating whether those theorists were responding to any philosophical concerns that could impugn warrant-based positivism's analytical framework.

When considering the relevant literature, there are two reasons that might be thought to explain why positivist scholars portray the existence of a legal standard to be dependent upon its validity. The first of these is most explicitly detailed within the work of Hans Kelsen. Remember now that Kelsen was engaged in an attempt to purify the philosophical understanding of law from the influence of sociological considerations. Consequently, he held that the philosophy of law must interpret the social reality of legal practice via the medium of "norms" – theoretically authorized points of institutional policy. It is here that one finds a necessary connection between the existence of a legal standard and its validity. For, Kelsen's approach is grounded in the premise that:

> By validity we mean the specific existence of norms. To say that a norm is valid, is to say that we assume its existence or – what amounts to the same thing – we assume that it has "binding force" for those whose behavior it regulates."[204]

Given this assertion, it is clear that if one pursues the philosophical analysis of law according to the terms of Kelsen's "normative jurisprudence", one is thereby committed to the conclusion that the body of legal standards must be understood as a "system of valid norms" and as nothing else.[205] For, the alternative would be to realize a theoretical incoherence. The question, then, is whether this line of reasoning bears on the theoretical plausibility of warrant-based positivism.

The answer, in short, is that it does not undermine this newly proposed theory of law in any way. For, like Hartian positivism before it, this new delineation of the nature of law is the result of a different approach to legal philosophy than that pursued by Kelsen. Specifically, it is intended to respond to the:

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[204] Kelsen, *General Theory*, 30.
[205] Ibid., 162.

> …standing need for a form of legal theory or jurisprudence that is descriptive and general in scope, the perspective of which…is of a form of social institution with a normative aspect, which in its recurrence in different societies and periods exhibits many common features of form, structure, and content.[206]

As such, warrant-based positivism is grounded in the rejection of the idea that the proper objects of jurisprudence are only "norms and not patterns of actual behavior".[207] Instead, this position offers a legal theory which speaks to the fact that the law can be comprised of social standards that fail to exist as hierarchically authorized norms, along with those which are so sanctioned. Accordingly, there is nothing incoherent about the fact that this position ascribes the status of occurrent law to every practice and policy that achieves governmental uptake, as an ostensible norm. Just as there is nothing questionable about the fact that it also moves to distinguish the valid members of that set, from those that are not.[208] Understood in this way, it makes no less sense to think that a legal standard can exist when it is institutionally invalid, than it does to think that an argument exists even if it fails to be logically valid. Consequently, while Kelsen's line of reasoning may be sound with regard to exercises in normative jurisprudence, it does not carry any weight with more sociologically sensitive approaches to legal philosophy such as the warrant-based account.

Moving on, the second reason that might be thought to explain why positivist scholars have hitherto held that the legal existence of a standard depends upon its validity is rooted in an apparent truism about the nature of law. More specifically, it is grounded in the premise that this phenomenon is only ever realized as a system of institutional standards.[209] Given this supposition, it follows that every legal regulation must exist as a

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[206] Hart, "Comment" 36-7.

[207] Kelsen, *General Theory*, 163.

[208] This state of affairs is rendered conceptually incoherent on Kelsen's "Pure Theory of Law", see his *General Theory*, 154-160.

[209] While, broadly accepted, this ostensible truism has not been universally embraced. For instance, H.L.A. Hart hedged his endorsement of this idea by allowing

member of, or at least as a function of, some particular legal system. To see how this is relevant to the present concern, one need only consider the following few points: modern legal positivist accounts hold that in order for a practice or policy to be ascribed the status of legal validity it must have been authorized by some governmental institution's normative framework. Thus, when such positions assert that the legal existence of a rule is dependent upon its legal validity, they thereby insure that every existent legal standard is sanctioned by - and is, therefore, to be associated with a specific systemic structure. And, insofar as this is the case, they are thereby able to explain how it is that every legal rule exists as a part of a legal system. On this basis, positivist scholars such as H.L.A. Hart have claimed that, "(t)o say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system."[210]

Now, with this line of reasoning in mind, one might wonder whether warrant-based positivism can accommodate the conceptual implications of the above-noted truism. For, insofar as this position allows invalid legal regulations to exist, it might be thought to allow for rogue legal standards: practices or policies that are not affiliated with any particular system of legal norms. However, as was the case with the first point of consideration, this issue does not raise any real problems for the newly proposed understanding of law. For, although this theory cannot partake of the traditional positivist method of identifying the content of a given legal system, it is equipped to do so in a different way.

To see how this is possible, one must again consider the fact that this approach to legal philosophy takes the sociological aspect of legal practice very seriously. Thus, where the traditional positivist approach to identifying the content of a legal system relies

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that while the practice of municipal law is systemically structured, international law appears to take the form of a "set" of standards that are not obviously systemically related. See, Hart, *Concept of Law*, 229. More recently, Michael Giudice and Keith Culver have developed a non-Hartian understanding of law that seeks to do away with this premise altogether, by playing up the conceptual importance of non-state instantiations of law. See, *Legality's Borders* (Oxford: Oxford University Press, 2010) Ch. 5.

[210] Hart, *Concept of Law*, 103.

upon normative considerations to get the job done, the warrant-based position has other means at its disposal. Specifically, this position can and should be understood to hold that the content of a given legal system is, at least partially, determined via reference to the empirical reality of occurrent law.[211] So, if one were interested in identifying the content of the Canadian legal system, one ought to attend to whatever standards the administrators of that polity portray as falling under the aegis of Canadian law. What makes this move effective, is that insofar as ascriptions of occurrent law track those regulations that officials treat as being a legitimate member of the governmental institution over which they administrate, such standards are necessarily associated with a particular system of legal norms - and this is true even when a given standard is, itself, invalid. Thus, even though warrant-based positivism does not cast the legal existence of a standard to be dependent upon its validity, this stance need does not entail the emergence of rogue laws. Consequently, this position appears to be perfectly compatible with the idea that every point of law will be necessarily associated with a particular legal system.

Given the foregoing arguments, it can safely be said that although positivist scholars may have had good philosophical reasons to construct their models such that the legal existence of a standard was made dependent upon its legal validity, these considerations either do not apply to the warrant-based approach or it can deal with them in an alternative manner.

4.2 The Conceptual Viability of a Multi-Vocal Account of Law

In the previous section, the suggested problems for warrant-based positivism required a significant degree of immersion in legal theory to anticipate. But, once they were identified, it was obvious that they were of no particular moment. Whereas, the

[211] This, it must be noted, is only one of a wide of array of challenges involved in offering any plausible account of the content and identify of a given legal system. However, it is the only one that might be thought to provide support for the forerunners of warrant-based positivism, without also supporting that theory itself. For the seminal work on these different concerns, see Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Clarendon Press: Oxford, 1970).

opposite is true of the issue that will be considered here. Which is to say that next challenge to be confronted is perhaps the easiest to foresee even while it is among the more difficult to convincingly respond to.

This concern is rooted in a premise that many contemporary legal scholars appear to take for granted: namely, that the law is generally thought of as though it is a univocal phenomenon – that its standards can be understood to express a single, holistic governmental orientation.[212] The reason that this point might be thought to create a problem for warrant-based positivism is that, as a self-identified enterprise of analytic jurisprudence, this undertaking was supposed to have been theoretically responsive to the terms of the popular imaginary of law. However, rather than catering to the ostensibly univocal leanings of legal discourse, the warrant-based approach has modeled the law as though it were a multi-vocal phenomenon. Thus, it seems plausible to claim that this new account fails to respect the conceptual contours of its subject.[213]

Now, perhaps the simplest way to try and deal with this problem would be for the proponent of warrant-based positivism to take the argumentative path of least resistance. This would be a matter of granting the claim that the law is widely thought of as a univocal phenomenon, even while counterbalancing that admission by reiterating all of the descriptive-explanatory problems that emerge when such an attitude is humored within the philosophical portrayal of that subject. In other words, one might cede a certain amount of conceptual importance to univocal interpretation of law, even while asserting that the meta-theoretical requirement to heed this tendency of popular thought is outweighed by the need to offer a philosophical model that precisely tracks the structural and dynamic capacities of legal practice.

But, despite any initial appeal, embracing this line of reasoning would be a serious misstep. For, if the law is a univocal phenomenon then that characteristic must surely

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[212] Examples of this discursive predilection can be found in sources that run the gamut from personal conversations to constitutional law texts.

[213] While there is no way to be sure, it seems likely that the acceptance of this line of reasoning has contributed to the historical lack of philosophical interest in trying to develop multi-vocal accounts of law.

count as one of its essential features. After all, an appreciation of the fact that the law only ever expresses a single governmental orientation serves to inform one's understanding of every possible instantiation of that sort of entity. On the other hand, the structural and dynamic considerations that are catered to by warrant-based positivism's multi-vocal approach appear accidental, or at least conceptually peripheral, by comparison. Since, those phenomena – which include official deviations from the terms of law and the normative mechanisms that are meant to deal with such transgressions - are highly contingent features of individual legal systems. Hence, if one were to try and rebut the proffered critique of warrant-based positivism by weighing the conceptual importance of these two sets of legal features against one another, it is not clear that the theoretical scales would tip in the preferred direction. Given this result, it seems wrong to think that taking the argumentative path of least resistance would be an effective manner of dealing with the conceptual force ostensible possessed by the idea of law's univocality.

But suppose that these last considerations were incorrect. Suppose that this balancing of meta-theoretical priorities actually would vindicate warrant-based positivism. Even if this were the case, the argumentative path of least resistance would not be endorsed here. For, upon close inspection, it is clear that the claim that law is widely held to be a univocal phenomenon runs afoul of certain key elements of popular discourse as well as of legal practice itself – especially that which is realized within large and complex constitutional systems. Thus, in the interest of conceptual verity, one must not respond to the issue under consideration in this section by skirting or adjusting to its key premise. Instead, it is better to dig in one's heels and confront that proposition head on. And, in what follows, this is exactly what will be done.

In order to get started, it is helpful to consider the popular understanding of two other kinds of phenomena wherein the terms of human practice and normativity interweave. The first of these is a proof: which is a logical or mathematical complex that is meant to establish a conclusion, and which has been tested to insure its veracity. With an eye to the idea that such entities have been tested, it is clear that the concept of a proof

suggests the soundness of its manifestations.[214] Somewhat differently, one can, again, think of an argument. Much like a proof, an argument is a propositional complex geared towards the establishment of a conclusion. However, unlike a proof, there is nothing about the nature of this phenomenon that suggests that its instantiations are always successful in realizing their formal end. In other words, there is nothing in the nature of an argument that speaks to its infallibility.

The reason for drawing this contrast is to highlight the fact that, within its popular understanding, the law is held to be much more like an argument then it is like a proof. Indeed, there are two broadly recognized categories of legal fallibility. On the one hand, it is widely admitted that while the existence of law can be of great moral benefit to a community, it can also be responsible for the realization of great moral wrong.[215] So, for example, law's normative framework might be designed to facilitate the realization of evil ends, as it was in Nazi Germany and apartheid-era South Africa. On the other hand, it is also obvious that although the law is meant to structure governmental activities towards the realization of specific organizational goals, it is susceptible to practical failings on this front. Here, one need only think of official errors, such as juridical decisions that fail to accord with the substance of law's institutional orientation.[216]

With an eye to the foregoing distinction, the argumentative focus of this section will be placed upon law's openness to practical malfunctions. More specifically, it will be centered upon the law's systemic fallibility: the fact that legal institutions, especially those that are large and complex, are the kind of things that are capable of producing and implementing policies and regulations that fail to meet the criteria of legitimate systemic membership. Now, to be very clear, the point here is not to tally up the litany of

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[214] The idea that a proof is a line of reasoning that has been tested stretches back to antiquity. Indeed, the etymology of the word can be traced back to the Latin "probāre", meaning: "to test".

[215] Leslie Green explores this conceptual point and its implications for analytic jurisprudence in, "Positivism and the Inseparability of Law and Morals" *New York University Law Review*, 83 (2008) 1035.

[216] For a discussion of this phenomenon, see, Stephen Guest's, "Objectivity and Value: Legal Arguments and the Fallibility of Judges" in, M. Freeman, and R. Harrison, eds., *Law and Philosophy* (Oxford University Press: Oxford, 2007) at pg. 76-103.

structural and dynamic problems that univocal legal models encounter when they try to account for the law's systemic fallibility. Rather, the thrust of this particular line of reasoning will be to highlight the fact that when the possibility of systemic fallibility becomes the subject of public and professional consideration, there is a strong tendency to construe and portray the law as a multi-vocal phenomenon.

To see how this is so, it is necessary to take note of the fact that the terms of legal legitimacy are quite often thought of and referred to as "constitutional" requirements or restrictions.[217] As such, it is telling that governmental policies, which are ostensibly enacted under the aegis of a given legal system but which do not satisfy the criteria of legal legitimacy, are widely portrayed as being "unconstitutional laws".[218] After all, insofar as this way of describing such standards holds them to be legally existent even while denoting that they have failed to satisfy the criteria of systemic legitimacy, it clearly speaks to the idea that the law is a multi-vocal phenomenon.[219] As such, the premise that the law is generally and, hence, properly thought of as a univocal phenomenon seems to rest on some rather shaky empirical ground.

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[217] This reference to "constitutional" boundaries is not limited to references to entrenched constitutional documents such as *The Declaration of the Rights of Man* or *The Constitution of the United States*. Rather, it is often used in its wider sense, where it refers to any and all standards "creating, structuring and defining the limits of government power or authority" in a given polity – whether it happens to rely upon such overt normative mechanisms or not. This broader usage is explicitly recognized within Waluchow, "Constitutionalism".

[218] There are exceptions to this tendency. Most obviously, one can look to the legal discourse at play within modern Britain, where the fact of parliamentary sovereignty means that no legal standard can be declared "…unconstitutional, for the law of the land knows not the word or the idea." See S.B. Chrimes, *English Constitutional History* (London: Oxford University Press, 1967) p. 42. In place of this term, the British refer to the "incompatibility" of laws with the substantive commitments of their legal community, such as those contained within the *Human Rights Act* of 1998.

[219] To see specific examples of this discursive phenomenon one need only scan newspaper articles and headlines, such as the editorial piece: "Blatantly Unconstitutional Law Ruled Unconstitutional", written by *New York Times'* Andrew Rosenthal. See, *The Editorial Page Editors Blog: NYT.com* (Feb. 24, 2012): http://takingnote.blogs.nytimes.com/2012/02/24/blatantly-unconstitutional-law-ruled-unconstitutional/

Further undermining that proposition is the fact that this multi-vocal interpretation of law's systemic fallibility has regularly and meaningfully been relied upon within actual legal practice - and this is true even at the highest of its institutional levels.[220] On the one hand, a huge array of appellate courts have recognized, and moved to deal with, the existence of legal standards that are systemically illegitimate. So, for example, the Canadian Supreme Court has explicitly and repeatedly referred to the existence of "unconstitutional laws" within its jurisprudence; going so far as to debate the merits of leaving such standards "on the books" after they have been brought to the court's attention.[221] On the other hand, and perhaps even more importantly, this tendency has also trickled into the content of entrenched constitutional documents themselves. For instance, one might recall from the second chapter that Section 52(1) of the Canadian Constitution Act states:

> The Constitution of Canada is the supreme law of Canada, and any *law* that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[222]

As such, the statutory bedrock of the Canadian system of law has been framed in a way

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[220] This observation is certainly nothing new to legal scholars. Kelsen, for example, felt the need to contend with it when he considered the question:

> What is the law, if a norm is not in conformity with the norm that prescribes its creation and, especially, if it is not in conformity with the norm predetermining its content. Such a conflict seems to be present if certain expressions usual in the traditional science of law are taken literally; such expressions are "unlawful" judicial decisions and "unconstitutional" statutes, which give the impression that such a thing as "a norm contrary to a norm" in particular were possible.

In, Kelsen, *Pure Theory,* 267.

[221] See *R. v Ferguson*, S.C.R. 96, 2008 SCC 6. What is particularly telling about this case is that the court did not argue that the idea of an unconstitutional law was incoherent or confused. Rather, they contended that by leaving such "laws" on the books they would not be "giving clear guidance to Parliament as to what the Constitution requires".

[222] *Canadian Charter of Rights and Freedoms,* (Emphasis added).

that acknowledges the existence of illegitimate legal standards, even while it has been designed to deny them the normative relevance reserved for legitimate practices and policies.

Taken together, these facts about the institutional practice of law strike a couple of different blows against the plausibility of the claim that law is generally thought of as a univocal phenomenon. On the one hand, they demonstrate that the multi-vocal interpretation of law is not just a feature of uneducated legal opinions. For, to the contrary, it is clear that this understanding has received significant uptake amongst those who work most closely with the law, i.e. judges, constitutional framers. What is more, as a result of its being expressed within the upper echelons of juridical practice, and incorporated within the basic institutional structure of certain legal systems, this conception of the nature of law is continuously being promulgated via the most authoritative of legal sources. And this, of course, serves to establish a feedback loop that only further entrenches the idea that the law is properly understood to be a multi-vocal phenomenon.

With all the above points firmly in mind, it is obvious that there is a river of thought at play, within both the popular and professional domains of legal discourse, that is in significant tension with the premise that the law is generally construed to be univocal in nature. Indeed, it seems that when people consider the possibility of law's systemic fallibility they often come to the same conclusion that warrant-based positivism was developed to accommodate: namely, that the law is a multi-vocal phenomenon that is structured such that a legal standard can exist, even if it is incompatible with the criteria of legitimacy established by the institution in which it achieves uptake. Thus, it is far from obvious that the newly proposed model of law fails to respect the conceptual contours of its subject. Rather, it is clearly being responsive to a widely held understanding of laws' vocality.

But, perhaps this is too fast. For, there is an issue with this line of response that needs to be addressed before one can be confident in its conclusion. Specifically, at this point it would be quite fair to object that the above retort is guilty of overlooking the

existence of an alternative understanding of law's systemic fallibility - one that is perfectly compatible with the idea that law is univocal. For, while it is true that there is a discursive, and even an institutional, tendency to treat systemically illegitimate policies as though they are laws, it is just as true that there is another stream of public and professional discourse wherein such standards are held to be completely bereft of any legal standing whatsoever. The most well known examples of this alternative interpretation come from the realm of American jurisprudence. For, instance in a decision from the United States Supreme Court it was held that:

> An unconstitutional act is not a law, it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.[223]

The question of the moment, then, is just what implications this discursive divide has for the assessment of the conceptual veracity of warrant-based positivism's multi-vocal account of law?

In order to answer this query it is helpful to summarize the current discussion to this point. Remember now, that the concern being attended to here rests on the premise that there is a popular tendency to think of the law as a univocal phenomenon. With that point in hand, along with the idea that exercises in analytic jurisprudence are supposed to be

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[223] *Norton v. Shelby County* (1886) 118 US 425. While this particular quotation comes from Justice Field, who was writing more than a century ago, the same sentiment has made its way into contemporary legal texts, such as *American Jurisprudence*, wherein it is asserted:

> The general misconception is that any statute passed by legislators bearing the appearance of law constitutes the law of the land. The U.S. Constitution is the supreme law of the land, and any statute, to be valid, must be In agreement. It is impossible for both the Constitution and a law violating it to be valid; one must prevail. This is succinctly stated as follows: The General rule is that an unconstitutional statute, though having the form and name of law is in reality no law, but is wholly void, and ineffective for any purpose.

See, 16 Am Jur 2d, Sec 177.

responsive to the terms of popular thought, the warrant-based position's reliance upon a multi-vocal understanding of law appeared meta-theoretically problematic. However, in response, it was noted that, within both the popular and professional realm of legal discourse, there exists a propensity to treat the law as a multi-vocal phenomenon. Thus, it seemed that the warrant-based position actually serves to accommodate the contours of legal thought rather than defy them. Yet, it has now been admitted that there are really two different discursive responses to law's systemic fallibility; one of which supports a multi-vocal interpretation of law, while the other supports a univocal understanding of that phenomenon.

What all this seems to suggest is that the argument from law's univocality is a moot point. For, it now seems clear that there is no definitive conception of the nature of law's vocality at play within popular or professional legal thought. Thus, it would simply be nonsensical to accuse warrant-based positivism of disrespecting the established conceptual contours of law as they regard this point – for no such parameters exist. Consequently, it can safely be stated that while some legal scholars might be tempted to think that the newly proposed theory of law violates its analytic commitments by proffering a multi-vocal understanding of law, a brief look at the diverse content of legal discourse serves to demonstrate that this just is not so.

4.3 Conclusion

If the considerations contained within this chapter are sound then two key challenges to the theoretical viability of warrant-based positivism have been met. For, while positivist scholars have historically rejected the possibility of analyzing the existence of a legal standard separately from its validity, it has been argued that their reasons for doing so carry no weight with regard to the warrant-based position. What is more, although there are some elements of legal discourse that might be thought to speak against law's multi-vocality, it has been established that there is also an important stream of popular and professional thought that plays upon that idea; thereby, conceptually

validating the theoretical structure of the warrant-based approach.

Now, in spite of these arguments, it would be foolish to assert that the warrant-based positivism is free from any theoretical faults. For, there will certainly be other points of concern that have not been recognized or dealt with as of yet. However, it is clear that the conclusions established herein do lend credence to the idea that the warrant-based theory of law can stand as a viable option, when one ponders the variety of philosophical positions on offer within the domain of analytic jurisprudence, and the broader project of understanding the law, as such.

Conclusion:

Within the recent literature, there has been a trend to disparage and marginalize the scholastic significance of analytic jurisprudence. For, insofar as Hartian models of law currently dominate its landscape, there appears to be little room left for substantive debate amongst its proponents. As Jeremy Waldron vividly puts the point, the hegemony of rule-based positivism means that "analytical discussions tend to be flat and repetitive in consequence, revolving in smaller and smaller circles among a diminishing band of acolytes".[224] Consequently, according to Brian Bix, it clear that "legal positivism is orthodoxy in desperate need of dissent".[225]

The point of this work has been to provide some. Here, it has been argued that every interpretation of the Hartian position falters in tracking the de facto terms of legal governance and/or in accurately representing the normative structures and mechanisms that legal institutions deploy in order to self-regulate. What is more, it has been contended that the reasons for these failings are discernable: the first being a matter of a widespread but unnecessary commitment amongst Hartian scholars to model the law as though it were a univocal phenomenon, while the second is rooted in the fact that it is the essence of the Hartian position to identify the grounds of law with the customary practices of officials.

With an eye to the above-noted problems and their causes, this thesis has moved to

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[224] Jeremy Waldron, "Legal and Political Philosophy," *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 381.

[225] Brian Bix, "The Past and Future of Legal Positivism," Address Delivered for the ascension to the Frederick W. Thomas Associate Professor Law and Philosophy, University of Minnesota, p. 28, quoted in Tamanaha, "The Contemporary Relevance of Legal Positivism".

reject the Hartian understanding of law in favor of an entirely new approach: one that portrays the law as though it were multi-vocal in nature, and which identifies its grounds with the fact that legal officials always purport to be acting under the aegis of an institutionally established normative framework.

In this way, the foregoing dissertation has sought to offer an understanding of positivism that moves analytic jurisprudence beyond the Hartian pale, and into new areas of theoretical discourse.

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