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Publication Date

2002-06-01

The Judicial Community

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1. The root of positivism is the idea that a legal system's criteria of legal validity have authoritative status just in virtue of social facts, where "social facts" consist of the behavior, beliefs, dispositions, and attitudes of certain persons in the community whose legal system it is.

So put, the claim of positivism is simple – deceptively simple, for it masks controversies about, for example, how facts can determine normative criteria, whether the criteria can incorporate moral claims, the way those criteria may be brought to bear on the legal propositions to which they potentially apply, the degree of indeterminacy they permit, and so forth. But this simplistic formulation nonetheless captures a thought: what counts as law is wholly a function of what (some) people do, and moreover of what they do together. To put the point more strongly, the positivist thesis locates the possibility of law with the possibility of community.

Relating positivism to community may be surprising, since positivism, at least in its contemporary form, was born amid metaphysical (and normative) doubts about collectives and

[✉] I am very grateful to Jules Coleman and Scott Shapiro for early conversations about the topic of this essay -- indeed, it was Scott who argued for the need for understanding positivism in terms of judicial collective action, and who made clear the form such a theory could take.

Joseph Raz has provided wonderfully helpful comments as well. And I am also grateful to Mark Antaki for his very helpful research assistance, and to the Townsend Humanities Center for fellowship support during this essay's writing.

communities as the source of law. But, I shall argue, the truth of positivism does indeed invoke claims about community, and in two ways. Neither of these ways, however, contradicts ontological individualism. The first invocation is the community to which the legal system applies and in which it operates – to those governed by it. And second is the community from whose practice emerges the criteria of legality, a community rarely coincident with the first. This paper addresses the second community, of law-determiners, whom I will call “judges” for simplicity’s sake. It asks, what must be true of the members of that community such that they can make law possible? How does what they do together create law?

2. I will first refine the positivist thesis that what counts as law is a matter of social fact. Positivist theories are traditionally understood by opposition to natural law theories, according to which legality turns on moral facts, not social facts. But this opposition is too crude, for some reasons that, though evident, it will be useful to detail.

Let us say generally that a proposition P correctly states the law of a given community if and only if P meets the criteria of legal validity applying in that community. (This is simply a definition of legality.) Where natural and positivist theories of law differ is on the source of authority for the criteria of legality, as well – on some versions of positivism – as on the possible content of those criteria.

The social world is deeply implicated in even a natural law view. What is now taken as definitive of natural law theory is the claim that legal validity turns, in part, on normative criteria. But that “in part” masks a complex of social dependencies. Imagine a legal system for a given society in which the question is raised whether a judge’s decision that the state is immune from tort damages really is valid law. On a natural law view, the criteria of legality necessarily

include so-called “pedigree” criteria for those forms of law emanating from social institutions, such as legislatures, court chambers, and custom, as well as substantive moral and political criteria. In the example above, the pedigree criteria will refer to the authority of the judge whose decision is at question: on the basis of what set of rules or institutional norms is she authorized to make legal judgments? The moral and political criteria, by contrast, will make the legality of the decision turn either directly on its substantive merits as a matter of political morality, or indirectly, on the moral merits of the lawmaker. But, and this is the key point, those moral and political criteria can only be deployed through propositions of law whose truth depends on social facts.

Let me explain. Even if a natural law view validates as law some propositions that satisfy only moral and political criteria – for example, background principles of justice such as “no one should be judge in his own cause”¹ -- such principles can only be effective as law in virtue of what I will call their “social instantiation.” This is true in at least three ways. First, the very terms of such background principles – what is a “cause”, a “judge”? – only have determinate semantic content in relation to the particular social institutions to which they refer.² Whatever one’s preferred ontology for generic moral properties like “just” or “wrong,” the

¹ “[A]liquis non debet esse iudex in propria causa.” Sir Edward Coke, *The First Part of the Institutes of England* (London: J & W.T. Clarke, 18th ed. 1823), § 141a.

² I don’t mean to imply that their content is exhausted by actually existing institutional structures, for there can be questions whether, for example, a matter for a court counts as a “case” – questions that cannot simply be answered ostensively. But actual institutions will supply something like a focal meaning for the term. I return to these semantic issues below.

propositions making use of those properties must relate them to entities and institutions in our social world. Otherwise, such principles are not propositions of law, but simply expressions of value.

Second, even on a natural law view, the criteria of legality are necessarily instantiated in the community's adjudicative institutions. This point is explicit in Ronald Dworkin's version of natural law, in which normative criteria are derived from a constructive interpretation of political institutions.³ But even on a traditional view, the tests for law are deployed (or deployable) by the institutions charged with its determination. This is not meant to be a controversial claim, but simply flows from the observation that "legal system" is a success-term: to describe something as "a legal system" is to presuppose some set of institutions capable of determining what the elements of that system are. The institutions may be highly imperfect, generating both false negatives and positives, for any proposition tested. But there must be some sense in which the legality criteria, normative and pedigree alike, are deployed by those institutions, else we are not talking about a legal system at all, but only a fantasy of one.

Third, and relatedly, there is a necessarily social dimension to the application of any legal system's criteria of legality, for they are mediated through processes of reason essentially embodied in social agents. It is, I take it, a widely accepted lesson of Legal Realism that legal argument is not simply a matter of deductive reasoning. And it is (or should be) a widely accepted lesson of post-Realist jurisprudence that legal reason is not exhausted by deductive

³ Ronald Dworkin, Law's Empire (Cambridge: Harvard University Press, 1986), ch. 2.

reasoning, so that Legal Realism does not entail skepticism.⁴ To put the point positively, the determination of what counts as law, as much as determinations of what the substantive law on a given point is, draws on analogical and other projective forms of reasoning, forms whose normative boundaries are at least in part matters of what the community of reasoners counts as legitimate non-deductive inference.⁵

3. So even on a natural law view, legality must turn on matters of social fact: institutions and practices give content to background principles of justice, and mediate their application to

⁴ I argue for the consistency of indeterminacy and rational justification in “Just Disagreement: Indeterminacy and Rationality in the Rule of Law,” Yale Law Journal 103 (1994): 997-1030.

⁵ Compare Stanley Cavell, The Claim of Reason (New York: Oxford University Press, 1979), ch. 5, on the grounding of reason in “form of life.” Wittgenstein may be read to suggest that the rules of deductive inference, too, are grounded in forms of life, but this claim is highly controversial, to the extent it is not tautological. See Ludwig Wittgenstein, Remarks on the Foundations of Mathematics (Cambridge: MIT Press, 1967), esp. §§I, 149-155. I do want to distance myself from any claim, rightly or wrongly associated with Wittgenstein, that community approval is sufficient warrant for rules of inference. There may well be objective limits on how any particular community of reasoners can construct their rules of inference, just as there are natural limits on how a community can construct rules of eating. For discussion, see David Cerbone, “Don't look but think: imaginary scenarios in Wittgenstein's later philosophy. (philosopher Ludwig Wittgenstein),” Inquiry 37 (1994):159-184.

the putative legal norms they assess. On a natural law view, social instantiation is a necessary condition of the authoritative status of legality criteria, just because social instantiation is a necessary condition of the functional existence of those criteria. But those criteria are only adequate to the task of determining law if they (or some subset) incorporate moral criteria as well. The moral constraint on the criteria of legality is not a product of their social instantiation; it follows, rather, from the concept of law. The source of those criteria's authority is independent of their social instantiation.

Natural law theories insist that the judges only have reason to apply the criteria they do because of those criteria test for moral merit in the underlying law. Positivist views are distinguished by the claim that social instantiation, understood at least partly in terms of behavioral regularities, is both necessary and sufficient for the authority of the community's legal criteria – to their claim to be the criteria of what counts as law. To the question, “why are these the marks of legality?,” it is a sufficient answer that “that’s how we do things around here.” A principal challenge for positivism, as Jules Coleman has laid out in his new book, The Practice of Principle, is to show how that can be a sufficient answer.⁶ How can what we in fact happen to do around here be a reason for us to keep doing it? An imitative disposition may be reasonable, or it may be pathological – a compulsion to repeat. If law is in some sense a rational activity, then the dispositions in which it is grounded had better lie in the former camp. Positivism needs to show why.

Now, this challenge for positivism, explaining the authority of criteria of legality, may seem like one that can just as readily be skipped. If one understands the project of jurisprudence

⁶ Jules Coleman, The Practice of Principle (New York: Oxford University Press, 2001), ch. 7.

purely descriptively, then the relevant question simply is why the relevant social agents believe they have reason to do what they do. And one might then posit, as one answer, that social agents are simply disposed to follow each other's lead, to continue longstanding traditions, and so forth. The judges of the community could simply regard the criteria as authoritative in virtue of their social source, for example because that's what they learned in law school. Or it could turn out as a matter of social fact that judges abide by the legality criteria they do because they accept the force of certain moral arguments. Indeed, as I will suggest, an adequate positivist theory needs to save a range of phenomena, accounting for very different explanations of judicial practice, both individual and collective – that is, individual judicial decision as well as judicial debate and disagreement. (The challenge of accounting for systematic and profound disagreement within the institution is one posed most acutely by Dworkin, and I therefore will refer to it as “Dworkin’s challenge.”⁷)

But saving the phenomena, in the sense of offering a description adequate to the range of reasons believed by participants, is not enough for a philosophical theory of law. Such a descriptive project would be the jurisprudential analog of Mannheim’s sociology of knowledge, eliminating the epistemological dimension of the inquiry. In fact, the classical positivism of John Austin is, arguably, more sociological than philosophical.⁸ Philosophy’s role might then seem to be a sort of conceptual housekeeping, albeit the keeping of a large and rococo house. Given the role law claims as a source of reasons, and the role it demonstrably has in people’s practical reasoning, stopping the inquiry at the sociological level is either to accept without

⁷ See Dworkin, Law’s Empire, esp. ch. 1.

⁸ John Austin, The Province of Jurisprudence Determined (New York: Prometheus Press, 2000).

argument a skepticism about reason that must surely be argued for; or it is to leave uninterpreted the central terms of the social practice at issue. Positivism must be not only hermeneutic, in the sense of accounting for judicial motivation and deliberation as well as action, it must also be normative in testing and rendering an account of the reasons structuring judicial practice. The alternative is to concede to the normative notion of legal validity to the natural lawyer. This was, I think, also Hart's conception of positivism, implicit in his assertion contra the Holmesian predictive theory of law, that a judge's "statement that the rule satisfies the tests for identifying what is to count as law in his court [] constitutes not a prophecy of but part of the reason for his decision."⁹ What we need, then, is a positivist account that does two things: one that both reflects the structure of actual social institutions, including the structure of participants' deliberations, while explaining how those institutions can provide their participants with genuine reasons for action.

⁹ H.L.A. Hart, The Concept of Law (New York: Oxford University Press, 2nd ed. 1961), 105 (emphasis in original). Joseph Raz, in "Kelsen on the nature of normativity," claims that Hart was merely trying to account for what Raz calls the "social" as opposed to "justified" normativity of law. Raz, The Authority of Law (New York: Oxford University Press, 1979), 134. But Hart's distinction in his account of conventional rules between genuine obligation and the belief that one is obligated, clearly presupposes a distinction between subjective and objective reasons. Hart, Concept of Law, 88.

4. Because I have laid great stress on the descriptive aspect of positivism, it is worth getting clear, albeit in compressed form, about the relevant object of study.¹⁰ The study of judicial behavior, and in particular the study of judicial collective behavior, is a well-mined vein in contemporary political science. Most of the studies have concerned the U.S. Supreme Court, but despite (and in part because of) the narrow focus, the work has been revealing and is of considerable importance for philosophers. The dominant strands of work have been behavioralist, attempting to correlate judicial votes (whether at conference or in the final decision) with some set of causal factors. So-called “attitudinalist” models of judicial behavior correlate votes with judges’ ideological positions, as measured by pre-judicial statements or editorial comment. The findings of this model have been stark: in the words of the leading attitudinalists, Jeffrey Segal and Howard Spaeth, “Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is [sic] extremely liberal.”¹¹ A corollary of this view is that citation to precedent appears purely

¹⁰ This survey is indebted to the review article by Keith Whittington, “Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics,” Law and Social Inquiry 25: 601-633 (2000). See also Lawrence Baum, The Puzzle of Judicial Behavior (Ann Arbor: University of Michigan Press, 1997), for a useful overview. The argument of this section is indebted to Robert Post, “The Supreme Court as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court” (unpublished MS., 2001).

¹¹ Jeffrey Segal and Howard Spaeth, The Supreme Court and the Attitudinal Model (New York: Cambridge University Press, 1993), 65. There would be an obvious problem of circularity, if

epiphenomenal, as dressing for decisions more parsimoniously explained ideological commitment.¹² Law withers to a husk.

Despite the robustness of the correlations between votes and political positions, attitudinalists have been criticized for failing to attend to the difference that legal institutions make to judicial decisionmaking. A particularly striking factor in the history of the Supreme Court is the rise in the proportion of dissenting opinions and concurrences accompanying judgments, a proportion that hovered around 15-20% from the early 19th century until 1935, then suddenly shot up to the 50-80% range where it hangs today.¹³ Although the passage of the Judiciary Act of 1925, which gave the Court discretion over its docket, made a clear difference, the ten year lag in the rate of unanimity can only be explained by pro-consensus norms among the justices, norms which eroded over that period. Furthermore, research into justices' private papers and into court docket books (which record conference votes) shows the very deliberate attempts by Chief Justices – Taft, successfully, and Stone, unsuccessfully – to forge consensus amid disagreement, as evidenced by justices' switching their votes (or not) between the

evidence of the justices' politics were taken from their decisions. Spaeth and Segal confront the objection squarely, however, and I am convinced they separate the two data sets adequately.

¹² One measure of the force of precedent is that in only 10% of the studied cases will a dissenting Justice in the original precedent will later shift toward that precedent. Spaeth and Segal, Majority Will or Minority Rule: Adherence to Precedent on the U.S. Supreme Court (New York: Cambridge University Press, 1999), 287-288.

¹³ See Lee Epstein and Jack Knight, The Choices Justices Make (Washington, D.C.: CQ Press, 1998), Figure 2-1.

conference and the final draft.¹⁴ Cross-temporal comparisons of the opinions themselves reveal large differences in the kinds of authorities cited, with a sharp increase (particularly among dissents) in the citations to academic literature.

This evidence has given rise to two different kinds of theories that both complement and complicate the attitudinal model. On the one hand, rational choice approaches model well the extent to which judicial behavior must be seen as essentially strategic, with justices staking out legal positions that fall short of their individual policy preferences, in order to maximize the degree to which the collective decision approaches their individual preferences.¹⁵ On the other hand, “historical institutionalist” approaches emphasize the endogeneity of judicial preferences, particularly the degree to which judicial behavior can only be explained by institutional norms and legal traditions, traditions that shift in their meaning over time, and whose futures are functions of their pasts.¹⁶

Of course, it is dangerous to generalize from the behavior of the U.S. Supreme court not just to make a point about legal systems as such, independent of time and place, but even to make a point about U.S. legal practice. The U.S. Supreme Court has highly distinctive internal norms, methods of recruitment, and public visibility, and only self-imposed precedential

¹⁴ See Epstein and Knight; and Post, “Supreme Court as Institutional Practice.”

¹⁵ Epstein and Knight, *supra*, is the canonical work in this vein.

¹⁶ See, e.g., Rogers Smith, Liberalism and American Constitutional Law (Cambridge: Harvard University Press, 1988).

requirements – factors all of which may explain the law-determining practices of its justices.¹⁷

The bulk of law-determining goes on in the trial courts and courts of appeals, state and federal, where it is more plausible to assume that judicial determinations are made largely by reference to legal criteria whose force stems from their conventional acceptance.¹⁸

On the other hand, two factors make the Supreme Court studies worth taking into account. The first is empirical. While trial courts and collegial appellate courts have not been studied nearly as much, the studies that do exist point in a similar direction. The decisions of trial court judges appear to line up more strongly with a set of individually varied, exogenous goals, including policy preferences, reversal-avoidance, re-election seeking, and time-saving. As with the Supreme Court justices, “following the law” does not seem to name an explanatory factor.¹⁹ And studies of appellate courts have shown the same kind of strategic behavior and

¹⁷ For example, it is suggested that Supreme Court justices clearly play to a public, seeking to enhance public reputations, through their practices of dissent. See Baum, Puzzle of Judicial Behavior, 47-55.

¹⁸ Alternatively, one might see lower courts as applying norms validated by higher legal norms, and doing so not because they accept the conventional authority of those norms, but because of other, external pressures to do so (for example the embarrassment of being overturned.) This view would put lower courts in the role of ordinary citizens, whose practice of obedience is not necessarily constitutive of the system’s rule of recognition, but may be simply a function of the exercise of power.

¹⁹ Baum, Puzzle, 24-25.

masked dissensus that characterizes the Supreme Court, as well as significant cross-temporal change in published dissent rates.²⁰

The second reason is conceptual: the top of the legal-ordered hierarchy is a particularly salient point for positivist theory. It may be true that the legal system as a whole is sustained through reliance on criteria of legality by lower-tier courts – on the everyday practice of recurring to statute books, case reporters and the like to determine what counts as law. But those criteria do not function as what H.L.A. Hart called “the rule of recognition,” a canonical statement of the supreme and authoritative norms of legality for a given legal system.²¹ Lower-courts’ use of those norms can be invalidated by norms established by the higher-court, while the highest-courts’ norms can only be invalidated by a change in the practice of the high court (putting aside the possibility of constitutional change). The superiority within the system of high-court established norms means that those norms, as understood by the high court members, must be considered the actual criteria of legality.²² And so we have to confront the question whether acceptance, simply put, constitutes the basis of their authority.

²⁰ See, e.g., Justin J. Green, “Parameters of Dissensus on Shifting Small Groups,” in Judicial Conflict and Consensus, ed. Sheldon Goldman and Charles M. Lamb (Lexington, Kentucky: University Press of Kentucky, 1986), 139-153; and Henry R. Glick and George W. Pruet, Jr., “Dissent in State Supreme Courts: Patterns and Correlates of Conflict,” also in Goldman and Lamb, 199-214.

²¹ Hart, Concept of Law, 94-95.

²² This is to neglect Kent Greenawalt’s point that, strictly construed, the rule of recognition for the federal system therefore consists of the amending clause of the Constitution, since the rule of

What of philosophical use emerges from the studies of judicial politics? One point that should be resisted, I think, is the purely skeptical reading of the legal process, even though that is a clear lesson of the more reductionist literature. We must recognize that legal deliberation is thoroughly political, and that ideological conviction and strategic calculation play a great part in explaining behavior. But we can recognize this without eliminating law as a mediating set of reasons, a grammar through which this particular dialect of politics is spoken, as well as a framework which makes available certain choices and not others.

The lesson to take away is more modest: the norms governing judicial behavior, especially judicial collegiality, are not conceptually fixed, but are rather historically-specific products of interpersonal relations, particular leaders, and relations to other political actors and institutions, notably the legislature. Judicial behavior ranges from the extremely collegial to the strategic to autarkic. To put the point as charitably as possible, as an actual social process, judicial behavior seems better explained as an attempt to further individual substantive views of the good in a complex strategic environment, than as an attempt to reflect some prior agreement. A secondary task may follow, of effectuating the right decision within the institutional framework, by persuading or bargaining with other judges. But that is secondary, consequent upon the project of considering the matter aright.

recognition is also, according to Hart, the supreme criterion of law. But this point depends on Hart's particular formulation of the criteria of legality. See Kent Greenawalt, "The Rule of Recognition and the Constitution," *Michigan Law Review* 85 (1987): 621-671. I am indebted to Greenawalt's article.

So an account of law grounded in judicial behavior had better not place too many demands on how judges conceive their relations to their colleagues, or, more generally, how they understand their relation to the institution of the law. It is, of course, a direct implication of positivism that judicial norms are matters of social practice – the fact of their contingency is recognized. But positivism has been markedly reluctant to take seriously the import of that contingency, instead deriving virtually a priori the content of its account of the social foundations of law. What we need in its place is a less restrictive philosophical account of the judicial community, one ranging over very different degrees of interdependency and independence.

5. The philosophical tradition of positivism has not followed what we could call the positivist tradition of positivism. Philosophical accounts, by contrast, have portrayed judicial practice not in terms of a mix of politics, individual goals, and strategy, but rather in univocal terms of rule-following. The challenge philosophical positivists have tried to meet is not actual descriptive adequacy, but rather the conceptual problem of showing how any social practice can give rise to reasons. And while positivism has succeeded in the second challenge, it has largely failed in the first. Surveying the reasons will be instructive.

H.L.A. Hart's solution to the problem of showing how social practice could give rise to reasons was, famously, the claim that the criteria of legality were elements of a social convention among the judges of that system. By "social convention" Hart meant a "convergence of behavior" by a group of individuals, towards which the individuals take a distinctive "critical

attitude,” an attitude Hart also refers to as an “internal point of view.”²³ In taking this point of view, the members of the group see themselves as having reason to conform their own behavior to the convergent regularity, as well as to criticize others’ deviations from that convergence. A positivist account of law emerges from Hart’s further claim that the authority of the community’s legality criteria derives from the acceptance of those criteria as conventional. That is, the tests for law deployed by the community of judges are the proper tests just because those tests are matters of convergent behavior towards which the members of the community adopt a distinctive critical attitude. Social facts, therefore, are sufficient for the existence and authority of the criteria of law.

There are, equally famously, many obscurities and difficulties about this account of social conventions, let alone its application to law. A central obscurity lies in the question how taking an attitude toward a practice can provide a reason to engage in that practice. And one difficulty lies in the extension of the account of convention from the kinds of easily identifiable convergence of social mores – e.g., hat-tipping, not slurping, conversational distance – to behavior whose convergence seems to exist only at the most abstract level, namely in a practice of arguing what proper behavior is in the first place. A second, closely related difficulty follows: how to extract propositional content (the content of the rule) from a range of behavior. There is always a problem of characterizing behavior in terms of a rule, even behavior of a heretofore thoroughly consistent sort; this is the problem of rule-underdetermination made prominent by

²³ Hart, CL, 86ff.

Wittgenstein, especially as interpreted by Saul Kripke.²⁴ But the problem with divergent behavior is not simply that indefinitely many rules are consistent with prior practice but diverge in future prescription. The problem is, rather, that divergent behavior can only be seen as exemplifying a rule through an exercise of what Dworkin has aptly called “interpretation,” in which core instances are identified and deviations rejected.²⁵ But interpretation is necessarily a subjective process, in the weak sense that one’s interpretation of something (an inscription or utterance, an object, a set of historical facts) is a matter of trying to make sense of that thing relative to a set of expectations and beliefs whose source is in the interpreter. Such subjectivity, or individual variance, is consistent with plenty of objectivity, in the form of constraints on what sort of expectations it is reasonable to have about the thing. But these constraints make room for plenty of indeterminacy in what counts as a plausible interpretation.²⁶ (It would, for example, be unreasonable to try to interpret a bird song as an instance of a disquisition on physics, but perhaps not as a poem.) Where the data to be interpreted are complex, as is often the case in a

²⁴ Wittgenstein, Philosophical Investigations, trans. G.E.M. Anscombe (New York: MacMillan, 1953), esp. §§177-202; Saul Kripke, Wittgenstein on Rules and Private Language (Cambridge: Harvard University Press, 1982).

²⁵ See Dworkin, Law’s Empire.

²⁶ I mean here to allude to Donald Davidson’s account of interpreting of an idiolect, a condition of whose possibility is objective constraints on the belief attributable by the interpreter to the speaker, but which leaves room for a range of plausible interpretations. See, e.g., Davidson, “The Inscrutability of Reference,” in Inquiries into Truth and Interpretation (New York: Oxford University Press, 1984).

complex legal system, disagreement is likely. If it is contested what the content of the rule of recognition is, then the rule cannot function as a rule, as an objective point around which participants can converge their behavior. Each, rather, is likely to be attempting to converge around different interpretations of the rule. Hart's response to disagreement is to say that where there is disagreement, there is no rule; but this response only works so long as the disagreement is closely cabined, for if there is generally no rule of recognition, there is also no legal system. So if disagreement is in fact pervasive, the problem for Hart's account is real.

I will deal with the obscurity first, deferring discussion of the difficulties till later in the paper, when we will be able to avoid them instead of having to solve them. Participation in a social convention is, on Hart's view, sufficient for its own warrant. But how can engaging in a practice be a reason to engage in that practice?²⁷ The central point for understanding Hart is to see that the "internal point of view" names not a belief about what one should do, but a complex motivational state, a state consisting in part in beliefs about the desirability of the practice, but also pro-attitudes towards the practice, and dispositions to act on those attitudes and beliefs, both positively (conformity) and negatively (critically).²⁸ "Accepting" a practice, in this sense, is

²⁷ For this statement of the problem, and a discussion of the solution, see Coleman, Practice of Principle, ch..7.

²⁸ In the jargon of philosophy of mind, the "internal point of view" has in part a world-to-mind direction of fit, unlike belief which has a mind-to-world direction of fit.

closely analogous to forming an intention, a state whose reason-generating powers are evident.²⁹ Take the case of intention: casting about for a way to spend the evening, I decide, and so form the intention, to go to the movies. It being a weekend night, I now have reason to check the schedule, make sure there's gas in the car, buy tickets ahead, and so forth. None of these are reasons I had prior to or independently of forming the intention. Nor do any of these reasons count in support of my forming the intention in the first place. My reasons for that rest with my interest in amusement, the fact that I have no competing obligations, etc. Indeed, it may be that I have overall reason not to decide to go to the movies. What matters here is simply the observation that forming the intention structures my deliberation and motivation such that I now have reason to perform those acts constitutive of fulfilling my aim.

Similarly in the case of conventions: we must distinguish someone's reason for accepting the rule from the reasons accepting the convention provides one with. In many cases accepting a rule is not a matter of decision. It may be, as with social norms, a matter of inculcation – discipline, in the Foucauldian sense. Alternatively, accepting a rule may be a deliberative or non-deliberative consequence of forming an intention or taking on a goal, as when one accepts the conventions of a genre in trying to produce an art work of a certain sort, or when one selects a set of rules to govern one's conduct in a game for which alternative rule-sets exist. Whatever the etiology of the rule's acceptance, its acceptance makes true claims about the reasons the agent has.

²⁹ For discussion, see Michael Bratman, Intentions, Plans & Practical Reasoning, ch. 5; T.M. Scanlon, What We Owe to Each Other, 45-47.

Nor should there be a problem in understanding conventional practices as generating not just reasons but duties. The crucial point is that the relevant sense of duty here is not that of an overriding moral obligation, but rather a category of reason that, within its domain, is mandatory rather than permissive, such that an agent may be subject to criticism for not acting on its basis. Certain sorts of conventions are defined by mandatory practices; to accept the convention is to accept that the practice is something one may be criticized for not doing. Games are the standard examples: to play chess is to make true claims that one must not move rooks diagonally, that one can only move pawns one square at a time, etc. The “musts” and “oughts” of the game masquerade as categorical imperatives, but that is only because the antecedent “if one is to play the game” is presupposed.³⁰ The situation is more complicated, as is well known, for social norms, where it may be hard to identify an antecedent “if” that an agent might voluntarily accept or withdraw from. But that complication arises chiefly in the second- and third-person deployment of the language of “ought” and “duty,” as in: “Young man, I don’t care what you

³⁰ Thus I agree with Andrei Marmor that worries about the duty-generating capacity of conventionalist accounts are spurious. See his “Legal Conventionalism,” Legal Theory 4 (1998): 509-531, 530, an article with which I have considerable sympathy in its emphasis on historical contingency. But cf. Coleman, Practice of Principle, 90-91. Coleman’s and Kenneth Himma’s reference to reliance-based obligations can only be understood as a way to show that judicial conventions impose prima facie moral obligations, a task beyond that called for by the positivist program. Coleman, Practice of Principle, 98; quoting Kenneth Himma, “Inclusive Legal Positivism,” in Coleman and Scott Shapiro (eds.), The Oxford Handbook of Jurisprudence and Legal Philosophy (Oxford: Oxford University Press, forthcoming 2001).

want – you ought not chew with your mouth open!” As Bernard Williams and Philippa Foot have written, these deployments can best be made sense of as devices for recruiting agents into a normative system, not as representations of the reasons they actually have.³¹

Indeed, it seems a strength in a positivist account that there should be an ambivalence about the status of duty claims, including duties of applying certain criteria of legality. On the one hand, the account needs to show in what sense the reasons to apply the criteria do present themselves as mandatory if it is to make sense of the normative vocabulary of law. On the other, a positivist account should make plenty of room for the renunciation of that vocabulary, for example to make room for the claim that an anti-slavery judge ought, morally, to have rejected the conventional criteria of legality and refused enforcement of the Fugitive Slave Acts. Understanding the normativity of legality as a consequence of acceptance precisely makes room for that ambivalence.

6. So the difficulty with Hart’s convention account is not that acceptance of a convention is inadequate to explain that convention’s authority. Such an account could provide an adequate analysis of a system of rules under deliberate institutional control. The problem, rather, lies in the account of the reasons provided by the criteria of legality, a problem whose symptom is

³¹ See Foot, “Does Morality Consist of Hypothetical Imperatives?”, Williams, “Internal and External Reasons,” Moral Luck; “Internal Reasons and the Obscurity of Blame,” Making Sense of Humanity. I mean only to invoke the language of “recruitment” for the uncontroversial case of etiquette norms. No one, I think, thinks that chewing with one’s mouth closed is a categorical imperative.

divergence and disagreement over the content of those criteria. And here I think the conventionalist account must be rejected.

The problem is that the conventionalist account seems to deeply mischaracterize the way in which judges decide what the criteria of legality are. Hart's account of convention makes the reason-generating capacity of conventions a brute fact, proceeding directly from acceptance of the rule, where "rule" is understood as a summary of collective behavior. One who accepts a convention of hat-tipping sees himself as having reason to tip his hat just in virtue of accepting the convention. As I argued above, there is nothing in principle wrong with this account – indeed it better captures the role of social conventions in practical reasoning than does Dworkin's proffered alternative of an independent "consensus of conviction," according to which the reason to tip one's hat is that one really does have an independent moral duty to hat-tip.³² Clearly there must be room for reasonable but unreflective conformity to account for some social norms.³³ The trouble is that judicial conformity is not like that, at least in core instances. To take a central case, U.S. judges do not accept the status of the Constitution simply because it is *comme il faut*. Rather, they accept the Constitution in virtue of seeing reason to do so. Its

³² Dworkin, "The Model of Rules II," in Taking Rights Seriously, 51. Dworkin's argument is effectively criticized by Hart in his Postscript, CL, 256-257.

³³ Indeed, most rules of etiquette could not survive rational reflection if they needed to be supported by Dworkin's "normative state of affairs."

authority is not brute, but is rather the product of deliberative reflection. Hart's theory is unacceptable because it appears to make no room for that reflection.³⁴

Alternative models of convention improve on Hart by accommodating the possibility of reflection, but they too fail to give judicial deliberation its due. According to David Lewis' influential account (adumbrated in the legal context by Coleman and Gerald Postema), conventions are best understood as solutions to coordination problems – that is, the problem facing individuals who most prefer acting together to any particular way of acting.³⁵ One who is a party to a convention in this sense takes current practice as a reason to conform, not unreflectively, but because conformity delivers the good of coordination. (Why participants believe they have a coordination problem is an independent question.) As with Hart's brute convention model, Lewis conventions are reason-providing to their participants, and moreover, unlike brute conventions, they are stable under reflection. To mangle Holmes, participants do

³⁴ I do not mean to claim that Hart thought judging purely unreflective, only that the theory of convention he provides makes no room for that reflection. The problem, as Marmor notes, may be that his paradigms of convention, social norms, are too arbitrary to serve as an appropriate model for law. And indeed, it is a notable feature of social norms that they erode under reflective scrutiny.

³⁵ David Lewis, Convention: A Philosophical Study (Cambridge: Harvard University Press, 1969); Jules Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis," Legal Theory 4 (1998): 381-425; Gerald Postema, "Coordination and Convention at the Foundations of Law," J. Leg. Stud. 1: 165 (1982).

have a better reason to follow the rule than simply that it was laid down by Henry IV: following the rule achieves coordination.³⁶

There are three serious problems with this model. The first, laid out by Scott Shapiro and Coleman, is that Lewis conventions exist only in a restricted domain, when all participants prefer conformity in a rule to any particular rule.³⁷ But it is antecedently unlikely that this distribution of preferences actually characterizes the judicial community, many of whom may well prefer that a particular rule obtain to general conformity.³⁸ More importantly, the possibility of law should not turn on such a distribution of preferences as a conceptual matter; the condition is far too strong. Second, the form of justification available to participants in Lewis conventions covers only a small range of the types of justification characteristic of adjudication. At most it would seem to cover the behavior of inferior court judges, who justify their behavior by reference to norms issued by superior court judges. Now, it is true that the preference-structure underlying Lewis conventions should be understood counterfactually, so that a participant need not be motivated by the desire to coordinate so long as she would not have chosen otherwise if her choice did not, in fact, coordinate. Thus, a judge could opt for an individually preferred legal rule because that rule seems right, but only so long as she would reject the rule if it weren't generally followed. But that is a very meager form of deliberative autonomy, for it still requires

³⁶ Oliver Wendell Holmes, "The Path of the Law," 10 Harv. L. Rev. 457, 469 (1897).

³⁷ See Coleman, Practice of Principle, 94-95 (citing Shapiro), for an explanation of this point.

³⁸ It would, for example, be difficult to explain the behavior of the U.S. Ninth Circuit Court of Appeals on any other basis; the frequency with which they are reversed suggests a counter-conformity strategy.

that, ultimately, the judge must prefer getting along to getting it right. And this does not seem to mesh with either actual studies of judicial politics, nor with the imaginative phenomenology that forms the basis of Dworkin's critique.

Third, Lewis conventions are incompatible with the kind of systematic disagreement among participants that characterizes adjudication, and so cannot meet Dworkin's challenge. While it is possible, as a formal matter, to identify "rule-governed disagreement over the relevant criteria" as the solution to a coordination problem, such a "solution" would be an evident practical failure. Since the very point of a Lewis convention is to eliminate disagreement over the proper rule, building disagreement into the convention would defeat the point. Hence positivism cannot explain the practice of pervasive disagreement by reference to conventions. Any theory of law that aims at descriptive adequacy, as positivism does, had better be able to capture the non-conventional aspect of practice. While Lewis conventions may well have a significant role to play in explaining law, it would seem a mistake to build them into the center of legal theory.

Coleman, in *The Practice of Principle*, has sought to remedy the deficiencies of the Lewis convention model by looking instead to the model of cooperation put forward by Michael Bratman in an important series of papers in the philosophy of action.³⁹ Bratman's goal is to characterize an important set of highly interactive activities – the examples he gives include

³⁹ Coleman, *Practice of Principle*, 96ff. See generally Michael Bratman, *Faces of Intention* (New York: Cambridge University Press, 1999), Part II, especially "Shared Cooperative Activity," 93-108.

singing a duet, painting a house together, or running a basketball play.⁴⁰ Abstracting from these instances, Bratman tries to provide a model that captures their distinctive features: (i) mutual responsiveness, in the sense of participants' dispositions to adjust their behavior in light of what others do; (ii) commitment to a joint goal, with (i) in service of (ii); and (iii) commitment to mutual support, in that each will try to make sure the others are able to perform their parts of the joint goal. Bratman's resulting analysis is complex, but the general idea is that such instances of cooperative action can be broken down into interlocking sets of individual intentions to bring about the joint goal, where each intends that the goal be realized in part through the agency of the others. The commitment to the joint goal, however, need not presuppose that the way to achieve the goal is settled; to use his example, you and I could both be committing to singing a duet together without having decided what song to sing. Thus, commitment to the joint goal is consistent with discussion and bargaining over how to achieve it.

Coleman suggests understanding the social practice constitutive of the rule of recognition as a Bratman-type shared cooperative activity (SCA). This conception, he thinks, helps us account for the way in which judicial practice is genuinely collective without presupposing an absolute preference for coordination, as with Lewis, as well as accommodating the kind of disagreement and bargaining that presents a problem for both Hart and Lewis. Moreover, conceiving the rule of recognition as an SCA can explain the rule's normativity, for the reciprocal expectations and reliance proceeding from the commitment to mutual support generate duties owed towards the other participants.⁴¹

⁴⁰ Bratman, "Shared Cooperative Activity," 93.

⁴¹ Coleman, Practice of Principle, 98-99.

The problem with invoking this model of shared cooperative activity precisely repeats the problem with Lewis conventions: it makes a much too strong assumption about the nature of judicial interaction. The central feature of SCA's is that participants unite in a shared project, shared in the strong sense that each aims at its realization through the agency of each. This is a very high degree of interdependence; indeed, one of the routine motives for engaging in SCA's is the intimacy of the association. But – as Bratman recognizes – there are many forms of genuinely collective action which do not meet the criteria of SCA's, particularly the very demanding criterion of mutual support.⁴² You and I might, for example, have an understanding that we will walk together, but with no commitment to stay the course; we each might peel off at any time without apology. So long as each of us pursues the walk together, each will try to match the other's stride, turning as the other turns. If we do so, we will genuinely be walking together. But neither need be committed to slowing down for the other's sake, so that we can finish the walk together. Neither of us, in other words, need treat the other as a source of reason nor ground of obligation; we can treat the other instrumentally, as a means of temporary entertainment. This would, of course, be a highly unusual way to walk together, but the point is that the presence of the relevant mutual commitments is a contingent matter, not a conceptual one, at least insofar as an account of collective action goes.⁴³

⁴² Bratman, "Shared Cooperative Activity," 103-104.

⁴³ Bratman makes a similar point, criticizing Margaret Gilbert's claim that mutual obligation is partly constitutive of collective action. See his "Shared Intention and Mutual Obligation," 130-141.

It may be that some collegial courts function as cooperative teams, each trying to support the efforts of the other to arrive at the correct determination of law. It is even more likely that coalitions of judges on collegial courts see their projects as cooperative, and not merely strategic. But it surely goes too far to characterize the judiciary as a whole in cooperative terms. To repeat the point above, it is a salient feature of adjudication is that getting it right is often more important than getting together, and the SCA model doesn't make room for that degree of independence within the collective institution. To put the point another way, the SCA account is over-moralized as a description of institutionally-structured collective behavior.⁴⁴ It is a further point that the normativity generated by SCA's does not well account for the normativity possessed by the criteria of legality. For the duties generated by the SCA model are duties owed to the other participants; they are the correlates of rights of performance. But that doesn't seem to characterize the normativity of institutionally-defined criteria. If, in fact, judges do have genuine moral duties to apply some and not other criteria, those duties are owed to the beneficiaries of the institution, not to their fellow participants.⁴⁵ In any event, as I argued above, there is no reason for the positivist to search for genuine moral duties; institutionally-defined duties suffice, and those can be generated by reference to institutional roles. Cooperation need not enter the picture.

⁴⁴ Surely the explanation of, say, Justice Scalia's angry dissents is not that they are his means of meeting his commitment to ensuring that his colleagues interpret the law aright. Rather, they are his means of stating what the right view is, period.

⁴⁵ They may have other duties towards fellow participants, such as courtesy, but that is a separate matter.

7. So what we need is an account of collective behavior capacious enough to encompass the Scalias and the Brennans, the lone rangers and the coalition builders, an account that makes the constitutive institutional norms matters of contingent emergence, not conceptual necessity. I am going to present such an account. But first, to put it in context, let's imagine a collegial setting with which most of us have more experience than the judicial conference room: the faculty meeting. Say that the faculty meeting is trying to decide which of two candidates to hire, each of whom does clearly strong but not perfect work, in the sense that the work is of obvious interest but has identifiable errors; and each of whom would complement the department's strengths in different ways. We can imagine at least the following deliberative scenarios taking place:

- (1) Each member of the faculty speaks his or her views, doesn't listen to anyone else, considers the matter individually, then votes. **(Pure Autarky)**

- (2) Each member of the faculty considers the matter individually, listens to others' views in order to detect colleagues' preferences, then advances arguments aimed at bringing those colleagues to his or her individual preference, or otherwise bargains for the preferred candidate. **(Pure Strategy)**

- (3) Each member is mainly concerned to agree with each other member of the department, so as not to have a split vote. So each searches for some point of salience around which to coordinate, for example, the candidate who satisfies the same criteria as the last hire. **(Pure Convention)**

(4) Each member believes that the majority of the faculty is likely to have considered the matter aright, and so each is concerned to vote with the majority. (**Pure Authoritative Deference**)

(5) Each member advances arguments and listens to the arguments of the others, comparing point against point, and attempting to work out a consensus position that accommodates all valid claims. (**Pure Cooperation**)

Following the deliberative (or not) process, the faculty members vote, a winner is selected, and dissenters (if any) nurse their wounds and grouse in private.

Pretty obviously, no faculty meeting matches any of these pure types, in part because individual members vary in their attitudes towards others' views, taken as a whole; and in part because individuals vary in their attitudes towards particular others, treating the comments of some as signal and others as noise. Moreover, people's interests in real or feigned unity vary in response to both the likely effects of disagreement on interpersonal relations, as well as pressures from the broader institutional environment. But whatever the general interactive profile of the department, and whatever the mix of individual attitudes, what happens at the end is the same: the department hires a candidate.⁴⁶

⁴⁶ This example is developed, although very differently, in J. David Velleman, "How to Share an Intention," reprinted in The Possibility of Practical Reason (Oxford: Oxford University Press, 2000), 200-221.

Pay attention to that last sentence: “the department chooses.” We ought to be more puzzled than we are, for choosing is something people do, and departments are not people (though they are made of people). And yet, unless this is the choice of the department, not just of a person or group of persons, it has no institutional significance – no authority, in a word. So how can a department choose? More abstractly, when can we attribute an act to a collective?

Two elements of the example are key: a set of rules structuring the institution, and collective action by the institutions’ members. The rules of the department prescribe roles for the members to play, as interviewers, deliberators, voters, and employers; and those rules are embedded within the rules governing the larger institution of the university. And those rules define a space of collective action, in which the department members can engage in the joint project of making the hire, for example by talking (in turn, more or less), voting, and finally acquiescing in the institutionally recognized collective decision. Indeed, the second element, collective action, would seem to have explanatory priority, since the rules structure the institution only insofar as they are instantiated in the practice of the institution’s members.

What we need, I believe, is what I have called in other work a “minimalist conception” of collective action.⁴⁷ As with Bratman’s account of SCA’s, but without the strong conditions of interdependence, individuals’ intentions and the relations among them are what turns a group of people acting into a collective, turns what they do into collective action. According to the minimalist conception, a group of people acts collectively when, and only when, each acts with

⁴⁷ See my “Acting Together,” Philosophy and Phenomenological Research 61(2000): 1-31. That article provides a criticism of more elaborate conditions of collective action claimed to be constitutive of it.

what I have called a “participatory intention” – an individual intention to contribute to some collective end – and there is sufficient overlap among individual conceptions of that end. More stringent conditions of mutual support, responsiveness, and the like may be implicated by particular types of collective action – tangoes come to mind. But the crucial idea for collective action as such is the idea of overlapping participatory intentions, or, more broadly, of individual action oriented around a collective goal.

When individuals act together in this manner, they justify claims of *inclusive* authorship, claims that “we did so-and-so,” when spoken by a member of the group. Such claims are inclusive because they can only be made by someone included in the group that together did something. (Contrast these with claims of *exclusive* authorship, claims that something is what “I have done.”) Assertions of inclusive authorship are, of course, a deep and familiar part of our social life. We teachers together, in our universities, educate our students, though each of us teaches only a few students and a few courses. We together, in our departments, deliberate, vote and hire, though only some read the files, others skip the meeting, only the chair writes the offer letter. And we judges together, in our courts and chambers, distinguish the licit from the illicit, law from policy, and render judgments, though some hear trials, others reverse us, and others recuse themselves for fear of conflict. These are all things we do together, acts and events for which each can say, for better or for ill, “we did this.” We do these things cooperatively, fractiously, and in various forms of hierarchical discipline and divided labor. But what makes it true that we do these things together is that each does his or her part of a collective project.

The move from “we did it” to “the department did it” should now be obvious. Third-personal claims that a collective acts are parasitic on the first-personal inclusive claim – deeply parasitic in the sense that they are rooted in what Gerald Postema has nicely called “deliberation

in the first person plural.”⁴⁸ The department does what we do, when we are the members of the department and act with that identity in mind. Of course, our acting as members of the department – orienting our action within that institutional space – is necessary but not sufficient for the department’s acting, for we might be posers. But assuming we meet the relevant criteria for being members of the department, when we vote the department chooses, and our collective choice will be authoritative, in the sense that each must recognize it as a product of our institutional voice. Here we see the importance interdependence of institutional rules and collective action: only because we satisfy the criteria of the institution does what we do count as institutional action. These criteria, moreover, are criteria both of pedigree and substantive performance. Just as someone not properly appointed could not be considered a member of the department in the formal sense, so also someone whose behavior was so out of line with institutional norms would also be excluded from the inclusive “we.” (“He’s not really a member of the department,” we say of the madman in the attic.)

Now there is one last point to clarify before returning to the case of law. I have said that participants’ conceptions of the collective goal must overlap, but that leaves matters too vague, for there is inevitably difference in individual conceptions of the collective goal, indeed debate about how to understand that goal. One member might, for example, think that our actual goal is to promote social justice by looking for a member of an underrepresented group, another that our goal is to show the dean that we are truly self-governing through exercising contentious choice, a third that we need to improve our curricular offerings in political theory. Our individual goals differ, but they overlap with respect to engaging in the hiring process, and that is sufficient to

⁴⁸ Gerald Postema, “Morality in the First Person Plural,” Law and Philosophy 14 (1995): 35-64.

make hiring something we do together, even if fighting for social justice, etc., is not. So overlap is essentially a pragmatic concept and always a matter of degree, given inevitable differences in each agent's expectations and conceptions of the group act. Agents will have more or less determinate conceptions of the group act, they may be more or less willing to compromise after bargaining on the character of that act, and they may have very different ideas about the scope of the group act, its duration and membership. As a result, a group act can be collective under one description and not collective intentional under another.

8. Let us return to law, and the problem for positivism of accommodating disagreement while retaining authority. This can be brief, since most of the work has already been done. Conceiving judging as collective action shows how law can be the product of social instantiation, while making room for the kinds of disagreement, normative argument, judicial politics, and Herculean deliberative jurisprudence that Dworkin rightly insists is part of the culture of mature legal systems.

Here is the model: a legal system consists of a set of individuals each intentionally doing his or her part in a collective project of establish a set of criteria for distinguishing those norms that have a privileged status in social ordering from other social norms, and determining the proper application of the privileged norms, plus institutions for generating and revising the privileged norms, plus some extensive set of social practices in a population governed effectively by those norms. We can without, vicious circularity, refer to the privileged norms as "legal" norms, understanding "legal" in terms of the uncontroversial social marks of governing potentially harmful behavior, channeling disputes, empowering contractors, susceptible to political change, claiming supreme authority, and so on; and we also can refer to the individuals

as judges, though the defense against circularity is slightly more complicated, and I will address it below. So, even more simplified, the model is this: A legal system consists of a set of judges, each intentionally contributing to the systematic distinction of legal from non-legal norms and regulating their application, plus other institutions capable of generating and enforcing those norms.

This model modifies the traditional positivist account by replacing the idea of a regulative convention with respect to the criteria of legality, with the idea of collective action. Alternatively put, it replaces the idea of a regulative convention with the social conditions of its possibility – but these are conditions as well of the possibility of institutionalized disagreement, considered consensus, and strategic bargaining. Regulative conventions still play an indirect role, in structuring the general institution, but they do not directly determine what counts as law within the system. So the institutional unity through content – a conventional set of criteria – becomes institutional unity through agents' orientation towards a collective goal. This orientation consists in part of agents' acceptance of the norms constitutive of the institution – what we could call acceptance of the job description and personal appearance rules (be disinterested, supply reasons for your decision, wear black robes. . .). It consists in a shared argumentative sensibility, concerning what sort of claim counts as a reason, what the limits of precedential assimilation and distinction are, what level of confidence in a decision is required. And it consists in an acceptance of the project of determining law under some description, be it using legal power to fight social power, or ensuring a social environment predictable enough for citizens to plan their lives, or acting as the agent of the legislature. But it need not consist wholly in acquiescence in a set of shared legal criteria, though such acquiescence may be a consequence

of the unified orientation. Consider the analogy of conversation, as developed by Paul Grice.⁴⁹ To engage in conversation is to accept certain linguistic conventions, as well as conventions of turn-taking, tone, and the like. And it is to accept a set of pragmatic norms, of relevance, economy, sincerity, and clarity. Sharing these norms (at least some of them) makes conversation possible; but the resulting conversation can be anything from flirtatious banter to consensus-building to a shouting match. Acceptance of the structural norms entails almost nothing about the nature of the conversational content.⁵⁰

Before addressing the problem of normativity, let me defuse the worry of circularity in presupposing an institutional space – the courts, more or less – that serves to orient judicial behavior. The worry is that the rules constitutive of the institution and its offices are legal rules, and so must be validated by the criteria established by the “judges.” But the judges are, by hypothesis, only able to establish legality criteria within the context of the constitution, and so circularity seems to be built in. There are two responses. First, as Coleman has argued, the circularity is only apparent, for the *legal* status of the institutional rules is not prior to the acts of the individuals who collectively establish the legality criteria.⁵¹ In establishing the criteria of legality, they make true the claim that they hold legal offices, and that (some of) the norms

⁴⁹ Paul Grice, “Logic and Conversation,” in Studies in the Way of Words (Cambridge: Harvard University Press, 1989), 22-40.

⁵⁰ Hence Grice is wrong, I think, to say that conversation is intrinsically cooperative, at least if “cooperative” is understood in Bratman’s sense. Sharing the project of talking together is necessary, but the commitment to mutual support need not be present.

⁵¹ Coleman, Practice of Principles, 101.

governing judicial behavior are legal. But the behavior precedes the ascription of legal status, not vice versa. Second, what is necessary is that there be *social* institutions that provide the environment in which what becomes legal practice can take place. Whether such social institutions exist is a contingent matter, a fluke of historical process.⁵² But if they do exist, then law is possible. The worry about circularity is analogous to a worry about Hobbesian political theory, namely that a solution to the collective action problem of the state of nature (the prisoner's dilemma) can itself only be established by a collective attempt to solve the problem. But of course a political solution to the prisoner's dilemma – a monopoly on violence, for Hobbes – can be the product of a non-collective process. What *sustains* the monopoly is that it does solve the collective action problem, but the explanation of its emergence can look quite different.

9. When judges do share an institutional orientation, no matter how they disagree in their decisions, their decisions count as conclusions of law, not of men. By acting collectively, judges warrant the attribution of their decisions to the institution as a whole: their decisions are decisions of law; their decisions therefore claim the authority the institution claims, and have the authority the institution deserves. The legitimating effects of the institutional attribution resonate both externally and internally to the institution. External to the institution – from the perspective of a legal subject – some judge's determination that P marks P as authoritative, as coming from a particular instantiation of authority, and so gives the subject reason to comply. And internal to the institution, the judge's decision is – from the perspective of another judge – something we

⁵² See Marmor, "Legal Conventionalism," 528, for a similar point.

have done, and therefore a move in the collective project that demands response. The response may acquiescence, or it may be rejection, but a response is demanded nonetheless. Compare liability: if I am a member of a group that together causes some disaster, I owe a response to that harm, and its victims, that I would not if I were not a member. Its being our act makes a difference, even if the act was not mine.⁵³ Similarly, some judge's decision that P is law is now an element in how other judges must understand what they together have done; it partly defines, by modifying, how the collective project is realized.

Here is the truth in Dworkin's claim that precedents have "gravitational force" even when the rule they stand for does not apply in the instant case. As a matter of phenomenology, the explanation lies in judges' realization that the decision is for which, and to which, they are responsible, since it is, in the inclusive sense, their decision. And as a matter of jurisprudence, the decision now exists as a kind of disequilibrium of the collective project of discovering the law, a shift in collective direction that may call for correction or endorsement. What does not seem true is that it should have even defeasible binding force as a precedent – that *stare decisis* should, as a conceptual matter, be a norm of the institution. Again, the comparison with liability is instructive. The proper response from me to a harm caused by a fellow actor may be sympathy, if my fellowship gives me insight into a basis for excuse; or it may warrant special condemnation, if my insight makes me see how stupid what he did was. Errors by other, in

⁵³ The importance of collective action for ascriptions of liability is the subject of my book, *Complicity: Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2000).

pursuit of the collective project I share, attract my attention, to be sure, but not necessarily my loyalty.

One consequence of this revision to positivism is that the criteria of law are no longer usefully represented in terms of a rule of recognition. Some rule-like generalizations, of course can be made – e.g., the Constitution is law, custom is law, legislative history is not law. And some of these generalizations may be supported by argumentative consensus, or by conventional acceptance. But the source of their support is a contingent feature, and the only general thing that can be said of the community’s criteria of law is that, ultimately, they consist in what the judges offer as contributions to the collective project of law-determination. Any statement of a “rule” represents merely a temporary equilibrium in an ongoing collective project. Fortunately, we do not need rules to account for normativity at the foundations of law. The duties of the judges to find law come from a shared conception of the institution in which they find themselves: to accept the job is to accept the norms, mandatory and permissive both, that structure the institution, and so make one liable for deviations therefrom. And the normativity of the decisions themselves, as I have argued, consists in their being products of the collective project, and so constituting grounds for deliberative response. The criteria are not, therefore, duty-generating, but they are response-demanding, and this seems normativity enough – moreover it is normativity whose ground is purely social. The distinction between positivism and natural law is thus preserved. Last, because inconsistent decisions need not be reconciled into a rule, this version of positivism escapes the problem of extracting a univocal, propositional rule from divergent behavior.

It also follows from this account that the criteria of legality cannot serve the function of guiding conduct as exhaustively as some positivists, notably Shapiro, have claimed, since that

function can only be performed by rules.⁵⁴ And since I have left open the possibility that the criteria of legality deployed by some or all judges may include, as a contingent matter, moral and political criteria, the account is open to Joseph Raz's related argument that moral and political criteria cannot perform the validating function that law must perform if it is to be law.⁵⁵ This is a complex debate, into which I do not wish to wander far. The response I can offer is this: insofar as the objection to non-rule-based criteria derives from the function of law, it would seem that it could be satisfied as a matter of degree.⁵⁶ This account does permit the coalescence of legality criteria into rules, as a contingent matter. So, even if as a conceptual matter a legal system is characterized in terms of a certain, very high degree of rule-guidance with respect to the criteria of legality, it may be a contingent matter whether collective attempts at legal organization actually satisfy the success criteria. This seems intuitively correct, for a social institution characterized by nothing but disagreement over the criteria of legality could not, as a matter of practice let alone principle, perform the social ordering that is an existence condition of a legal system. On my account, law is grounded in an adjudicative community, and while that community may be fractious, that fractiousness must be understood against a background of common purpose. The mistake, however, is to build agreement into the account of normativity at the root of law, or to think that normativity can only be provided by either rules or morality. Rather, what we do together can be a source of reasons.

⁵⁴ Scott Shapiro, "On Hart's Way Out," Legal Theory 4(1998): 469-508.

⁵⁵ See, e.g., Joseph Raz, "Legal Positivism and the Sources of Law," in The Authority of Law (New York: Oxford University Press, 1979).

⁵⁶ See Coleman, Practice of Principle, Lecture Nine, for a better defense of this claim.