

Authority: H. L. A. Hart and the Problem with Legal Positivism

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Legal positivists of the twentieth century have rejected the Austinian command model of law, which makes coercion the mark of the distinctively legal. Among the reasons for abandoning Austin's approach,¹ is one which has been gleaned from a closer linguistic analysis of the term "command." This kind of analysis, employed most notably by H. L. A. Hart, is grounded in the acknowledgement that "commands" or "demands," as opposed to "orders" or other wishes expressed in an imperative mood designed to secure compliance by threatening the addressee with something unpleasant or harmful, carry with them some brand of authority. One lucid expositor of his views expresses Hart's key point here when noting that "by virtue of some set of rules or principles which makes one person in certain respects the authoritative superior of the other, the one person may command or demand certain conduct of the other. The coercive superiority view, by ignoring the notion of authoritative superiority, fails to capture the important features of our language and thought about commands."² And as Hart himself remarks, "To command is characteristically to exercise authority over men, not power to inflict harm and though it may be combined with threats of harm, a command is primarily an appeal not to fear but to respect for authority."³

However, for those writing in the tradition of legal positivism who reject coercion as the mark of the distinctively legal, it is not merely the badge of authority alone which makes commands constituents of a legal order. Rather, it is the further condition that such commands take the form of rules or norms. In fact, one might claim that for such philosophers of law, the combination of *rule and authority* bring the "legal" into clear relief. That a legal system is known by the existence of "authoritative rules" or "authoritative norms" is a view expressed and defended at length by Hart in his famous treatise, *The Concept of Law*.

The major claim in this paper is that there is a distinct ambiguity in the way in which H. L. A. Hart employs the concept of authority in his account of the nature of law. It is a flaw in Hart's thesis that surprisingly few

philosophers of law have detected.⁴ Perhaps this is because they share his view that the concept of authority is inherent in the very idea of law.⁵ The results of my research suggest that their view might be mistaken.

Part One of this paper contains a brief overview of how Hart develops his concept of law as the union of what he calls "primary" and "secondary" rules; and how Hart formulates a conception of a legal system's foundations. In Part Two, I explain the ambiguity surrounding Hart's use of the term "authority" in connection with his claim that secondary rules generate specific, procedure-related obligations; an attempt is made in this section to resolve this apparent ambiguity in Hart's thesis. In Part Three, I examine the relationship between Hart's concepts of "legal validity" and "authority" in another attempt to formulate an unambiguous conception of the term "authority" as used in his text. A third attempt to provide an unambiguous account of Hart's notion of authority is presented in Part Four. The strategy employed here is to see how Hart's use of the term in his thesis might be placed within the context of a more rigorous analysis of the term.

Part I

In *The Concept of Law* H. L. A. Hart maintains that in stepping "from the pre-legal to the legal world" a society formulates specific rules for curing the defects of a social order supported by unofficial norms.⁶ In a pre-legal setting, there obtains the difficulty of resolving disputes concerning the scope of existence of a norm. A legal setting emerges when the society's members agree that certain norms will prevail over ordinary norms in cases of conflict; and such decisions which serve to resolve the pervasive conflict existing in most societies by setting boundaries of validity, establishing priorities, and cancelling invalid norms, are made by some "official" who possesses "authority." As previously noted, although Hart admits that authoritative norms are usually accompanied by sanctions of some sort (either the diffuse social sanctions of approval and disapproval or the specific sanctions of public officials), these sanctions differ in an important way from ordinary coercion; for they are accepted as legitimate, at least by some of the people to whom they apply.

Hart's replacement of the notion of "social rule" for that of "command" and his later claim that law is a system of social rules—more specifically, a union of what he calls "primary" and "secondary" rules—are thought to be his most incisive points of analysis, and among the more devastating arrows targeted against the Austinian-type view of the nature of law. These two features of Hart's theory about law are also essential moves in his argument to establish the position that without *authoritative* rules, there is no law.

Hart's discussion of "primary" and "secondary" rules constitutes a core element in his view that law is analytically tied to the concept of authority. Primary or "basic" rules inform persons that they are required to perform certain actions or to forbear from acting in a certain way, irrespective of

their individual desires. Secondary rules, i.e., those which are "parasitic upon" the primary ones, provide that persons have the liberty to take those actions or to make those statements which introduce new primary rules, eliminate or modify old primary rules, or control their functioning and limit their scope. Primary rules impose duties, or obligations, whereas secondary rules confer public or private powers, which in turn, may result in the creation or variation of duties and obligations.⁷ For Hart, "the key to the science of jurisprudence" is to be found in the union of primary and secondary rules.

It is Hart's further account of the nature of secondary rules which clearly shows the essential connection drawn by him between the concepts of law and authority. Hart tells us that it is obvious "that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment,"⁸ could live successfully by a regime of primary rules of obligation alone, i.e., rules which "contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other."⁹ For "if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative."¹⁰ In addition to this defect of "uncertainty" in the simple social structure of primary rules, Hart explains two other defects that must be remedied if our simple society is to evolve into a full-fledged legal order, viz., the "static" quality of primary rules and the "inefficiency" by which the primary rules are maintained and enforced by diffuse social pressure.¹¹ In the simple society of primary rules alone, Hart maintains, there is no procedure for abandoning old rules or for introducing new ones in order to intentionally adapt the rules to changing circumstances. Moreover, the obligations or duties of each individual would be fixed, without there being the possibility of modification of such burdens given relevant differences in particular cases; hence, we refer to such a social structure as being "static" in character. Furthermore, if no special agency is granted the power to "finally" and "authoritatively" determine whether an accepted rule has or has not been violated, disputes over this issue will be incessant. Such inefficiency will also be associated with another weakness of this simple social structure, viz., the fact that there will be a great waste of time in the efforts of the society's individuals (either those directly affected or the society at large) to administer sanctions for violations of the primary rules, in the absence of a special agency empowered to do so.¹²

Therefore, Hart concludes, the remedy for each of the three defects described "consists in supplementing the primary rules of obligation with secondary rules which are rules of a different kind."¹³ According to Hart, the importance of this cannot be overstated; for it is, in fact, this supplementation that turns the "pre-legal" world into a "legal" one by introducing into the social order of primary rules numerous characteristics that help to

form the fabric of law itself. Although the secondary rules adopted to remedy each specified weakness differ from each other, there are two qualities about them which permit us to classify them under a single rubric: first, that they are all rules *about* primary rules, and second, that they all tell us how to *authoritatively* determine the existence of primary rules, and the manner or method of introduction, repeal, modification, and violation of these primary rules. It is by means of combining such secondary rules with primary rules that *authority* and *finality* are imparted to the society's social structure, implying of course, that the latter two characteristics are necessary elements of any legal order.¹⁴

But although Hart's secondary rules are functionally designed to lend the "mark of authority" to the social order's primary rules, Hart has not yet explained what he means by "authority" or what he means when speaking of criteria that are "authoritative." We will shortly see that his remarks concerning the foundations of a legal system do not help in this regard.

The foundations of a legal system, according to Hart, rest upon a secondary rule of recognition that "is accepted and used for the identification of primary rules of obligation."¹⁵ The condition which must obtain in order to correctly assert that such a rule has been accepted, is the provision of "*authoritative criteria* for identifying primary rules of obligation"¹⁶ to both private citizens and public officials. (Emphasis added) The forms the criteria may take "include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases."¹⁷

What is distinctive of a legal system, as opposed to a simple society consisting only of primary rules of obligation, according to Hart, is the fact that "a special authoritative status" is conferred on the decisions of courts that a particular rule has been correctly identified as law, by other rules within the system—rules created by the particular legislative body. Hart uses the analogy of game scoring to show how our intuitions about the authority possessed by officials in contrast to private persons might be accounted for. In the course of a game, any observer of the game may assert that a point has been scored by one of the teams; however, the only such declarations that have any "authority" are those made by the game's official(s). And such authority is conferred upon the official(s) by a more general rule which defines the activities that constitute the game.¹⁸ Hart also says that in order for a legal system to have authority, a good number of private persons must accept it voluntarily or, according to Hart, have an internal point of view with regard to the system's rules.¹⁹ But more specifically, Hart maintains that there are "two minimum conditions necessary and sufficient for the existence of a legal system," an understanding of which requires that we clarify the concept of legal validity. For Hart states that "on the one hand those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on

the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials."²⁰

But it is Hart's refined formulation of what constitutes the foundation of a legal system that enables one to reconstruct a thesis of the relation between the concepts of authority and law underlying his analysis, which is crucial for his attempted departure from Austin's version of positivism. Hart's reformulated conception of the foundation of a legal system is that of "an ultimate rule of recognition which provides a system of rules with its criteria of validity."²¹ He has argued not only that rules are of different logical kinds—"primary" rules and "secondary" rules—but also that they are not commands. Rules, according to Hart, are not commands because the normative character of rules enables them to "bind" or impose obligations on subjects—not simply because some individual or individuals use force or threaten to use force—if the subjects do not comply with the standard of behavior communicated by the rules. Rather, the person or persons issuing a rule must have authority to do so, and such authority can only be derived from another rule which is already binding on the subjects. In other words, a rule may be binding and be authoritative in origin if it has been enacted in conformity with some secondary rule that provides the criteria, the satisfaction by rules of which, constitute an imposition of obligation(s). This is in contrast, on Hart's thesis, to so-called primitive communities which have only primary rules that are binding simply because the community's members, through their practices, *accept* the rules as standards of conduct and interaction. We might say, therefore, that on Hart's account, the validity of a law is what implies the law's authority and hence, there is an important distinction between "valid laws" and the orders or commands of a gunman.

Now when a particular society has developed a secondary rule that is "fundamental" and which provides the criteria according to which law may be identified, the idea of law itself has emerged. And as we have seen, Hart names such a rule, a "rule of recognition." Although the concept of validity does not apply to this rule, the rule of recognition does have authority. Since it cannot derive its authority from any other rule within the system (it is "ultimate" and "supreme"), its authority and therefore its degree of "bindingness," must depend upon its *acceptance*. But Hart's emphasis on the notion of "acceptance" here must be clarified in order to further distinguish his version of positivism from that of Austin.

Although Hart asserts that an external statement that a legal system exists may be confirmed merely by observing that "the laws which are valid by the system's tests of validity are obeyed by the bulk of the population," such evidence is not sufficient for understanding the nature of law. It must be supplemented by a specific description of what Hart calls "official" behavior. That is to say, while knowledge of the structure of the legal system

or of its criteria of validity by the bulk of society is not necessary, such a condition must obtain in the case of public officials. It is not enough that public officials "generally obey" the laws which are valid by the system's test of validity. There must also be "a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity." This in turn, means that the officials must have an internal, critical point of view with regard to the system's rules (particularly with regard to the rule of recognition) that the ordinary citizen may, but need not possess. As Hart states, "Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single legal system."²² It is this specific background of standards in the form of a fundamental rule of recognition and accepted by public officials in the particular fashion just described, which many contemporary legal philosophers have claimed sharply distinguishes Hart's "authoritative norms" model of law from the "naked commands-coercive" model of law presented by Austin.

Part II

Although we now have a clearer picture of what it means, on Hart's account, to say that law is a system of authoritative norms, we have still not been presented with an adequate explication of the term "authority." Hart's use of the term is ambiguous. To see that this is so, we must now turn to his discussion regarding the generation of obligations by secondary rules.

The notion of secondary rules involving obligations to defer to specific procedures for identifying "correct" or "incorrect" behavior, is something normally associated with so-called "law-abiding" societies. The word "authority" often appears to be employed in contexts to indicate that there are some standards *external* to the claimant, as opposed to indicating that certain persons are in positions to exercise power over others. If this is how the word "authority" is often employed in ordinary discourse, as I assume here that it is, then there is no problem in understanding Hart's claim that "legal rules generate obligations *because* they are 'authoritative' norms." An analytic connection, in effect, seems to be drawn between the idea of authority and the obligation to obey whatever rule or rules the authority is said to be attached to or conferred upon.²³ But is this Hart's position? Were our concerns regarding an apparent ambiguity in Hart's use of the term "authority" unwarranted? I'm afraid not. To be sure, Hart emphasizes that, in contrast to traditional natural law doctrine which places primary emphasis on the content of the norm in deciding whether it is law, his concept of law "allows the invalidity of law to be distinguished from its immorality."²⁴ As is the case with other legal positivists, Hart places fun-

damental emphasis on the manner in which the purported legal norm was created as well as the effectiveness of it in ordering the relations among individuals. Therefore, on Hart's thesis, one can presumably assert that although any given set of legal rules may be authoritative, one does not have any obligation to obey them if they require persons to perform immoral acts. The distinction made by Robert Paul Wolff between "*de facto*" and "*de jure*" authority would be helpful in elucidating this idea.²⁵ Those legal rules having a *de facto* authoritative status would merely be those rules that many people *believe* have a morally valid status; such rules would not have, using Wolff's terminology, a "legitimate" authoritative status. A *de jure* authoritative status would be correctly attributed to those legal rules which are claimed to be authoritative and which are *in fact* morally valid; such legal rules *would* possess a "legitimate" authoritative status and those charged with employing them to govern the behavior of others would have a "right" to do so.²⁶ We could therefore maintain that Hart's usage of the term "authority" is "descriptive" as opposed to being "normative." That is to say, because a rule is valid according to the criteria of validity specified by the rule of recognition, it establishes behavior that persons are "legally obliged" (as opposed to having a "legal obligation") to perform or not to perform. Persons would, or should, expect that public officials will apply sanctions if they are caught violating the rule in question. Hence, Hart could be said to have a "value-free" notion of law as a set of "authoritative norms" as well as "value-free" notions of "legal validity" and "legal obligation." However, it is not clear that this is what Hart intends his concept of law to imply. We might assume that he would have made such a distinction if he thought it necessary or edifying. Indeed, his discussions regarding the distinction between "being obliged" and "having an obligation" suggest otherwise.

I don't think it is easy to resolve the perplexities in Hart's usage of the terms "authority" and "authoritative status" with regard to rules of law. In the next section of this paper, I'll attempt again to formulate an unambiguous conception of those terms as used in Hart's text by more closely examining the relationship between his notions of "legal validity" and "authority."

Part III

Hart believes, as any good legal positivist should, that the widely-held critical attitudes regarding deviations from the standards of conduct established by rules that are authoritative, need not rest on moral or morally good reasons; tradition, custom, religion, prudence, and other factors might be at work towards the formation of such views. But although the separation of law from morality is a cornerstone of positivistic legal theory, Hart's attempt to make a clear break with the Austinian thesis of law while remaining within the legal positivist tradition, has often led, as we have already seen to some extent, to the ambiguous use of key concepts, such as

"obligation." This ambiguity, in turn, leads one to question the strength of that supposed wall between law and morality. If we more carefully consider the kind of relationship that Hart believes exists between the directives of officials and ordinary citizens, we will see how this is so.

For Hart, there appears to be a kind of "superior-subordinate" relationship existing between the officials who issue directives and ordinary citizens. But the kind of superiority possessed by the officials is not like the gunman's, which is "coercive" in nature. Rather, officials or courts possess "authoritative" superiority.²⁷ The intuitive notion here seems to be that the existence of authoritative superiority is somehow worthy of respect in the way a gunman's superiority is not. Moreover, it seems to have the capacity to generate obligations to obey the rules of the system, to justify criticism of deviations from fulfilling these obligations, and even to justify the application of sanctions against those who violate the system's rules. More specifically, the origin of this authoritative superiority, according to Hart, is the *acceptance by the officials* of certain rules and principles (which form part of a structure of institutions) as authoritative; i.e., as creating or establishing standards of conduct the deviation from which may be regarded as justifying criticism and subjection to appropriate criminal and/or civil sanctions. Ordinary citizens need not accept such rules and principles from an internal point of view, although on Hart's account it is generally the case that in modern legal systems there is a good measure of voluntary acceptance and cooperation among the membership of the society.

But how are we to characterize this mode of "acceptance" of rules on the part of the officials so as to distinguish their "authority" from the "power" possessed by the gang of hoodlums? It might be possible on Hart's account to construe the authority of officials simply in terms of the *power* they have to make decisions which guide the actions or conduct of others, who are their "subordinates." The subordinate ordinary citizen, as it were, would be viewed as holding in abeyance his or her own critical faculties for choosing among alternatives. Hence, a mere "formal" criterion as the basis for choice would be present as the distinctive feature of Hart's departure from Austinian positivism, viz., "the communication of a rule" by officials and declared "valid" by them, as opposed to the "receipt of a command" by the gang's victims. Do we therefore have in Hart's thesis, a purely behavioristic account of authority? That is to say, although *validity* is thought by Hart to be the source of a rule's authority and, hence, distinguishes legal rules from the orders of a gunman, might it be the case that validity is simply a matter of adherence to a procedure of a certain sort which itself may be quite arbitrary and lacking in moral acceptability?

To be sure, Hart maintains that although validity is a "matter of fact" (i.e., the acceptance by officials of certain criteria), unlike a gang of hoodlums, the officials must have or make judgments of validity from an internal point of view. This condition may suggest that the critical and reflective

attitude of officials necessarily results in their making decisions that are morally acceptable in a way in which the decisions of a gang of hoodlums are not. Hence, the validity of law which is also the source of law's authoritative status, may have a foundation itself that consists in more than mere adherence to procedure. However, unless Hart also maintains that it is a necessary condition for the existence of law that the system's officials ground their decisions in moral or morally good reasons (and, by implication, that the officials always be concerned with the welfare of the society), we cannot attribute to Hart's notions of validity and, in turn, authority the substantive foundation which would clearly mark off the "superiority" of officials from that of a gang of hoodlums. After all, a gang of hoodlums, particularly a well-organized, hierarchical one such as the Mafia, which has its own internal rules, might also be said to issue "valid" orders.²⁸

I think that this observation helps to show the problems involved in Hart's attempt to ground the authority of a particular law in the validity of the law. There are ways in which we use the word "validity" that do not seem to suffice for our ordinary usage of the word "authority." The word "validity" may be used in a purely procedural context without confusing the listener, whereas the word "authority" appears to require its being placed in some sort of normative context. For example, it seems to make perfect sense to say that a particular rule is a valid law simply because the officials of a system have employed previously specified criteria for identifying the rule as law. The word "validity" need not suggest anything about the desirability of accepting or complying with the rule. Our use of the word "authority" in similar contexts, however, does not seem to be so simple. We somehow think that the word must have another common usage. For example, we could try to construe the statement "X has authority" to mean simply that it is a fact that "X has the ability (or power) to get his proposals accepted." If we have no qualms about connecting, in some way, the concept of authority with that of power, this *de facto* sense of authority would be quite acceptable. But this construal cannot be acceptable to Hart for two reasons: First, Hart wants to distinguish authority from the "ability" or "power" to do something. Secondly, Hart wants to say, contra philosophers such as Wolff, that both the idea of legal validity and the idea of authority which it generates, *themselves*, independent of long-run consequences or side effects, constitute a reason of some weight for complying with the law. Therefore, there would appear to be the need for making some room in Hart's account for a *de jure* notion of authority; viz., that the statement "X has authority" means that "X has a *right* to do such and such."²⁹ The problem with this interpretation of Hart however, is just that there is nothing Hart says in *The Concept of Law* which would warrant such a morally-laden construal of his use of the word "authority." Of course, Hart could mean simply that "X has a *legal* right," as opposed to a "moral" right, to do such and such. But if we

think this is what Hart means, then we seem to be falling back on what we have called the *de facto* notion of authority, clearly shown to be inadequate on Hart's account.

In the next and final section of this paper, I attempt once more to provide an unambiguous account of Hart's notion of authority. My strategy this time will be to see how Hart's use of the term in his thesis might be placed within the context of a more rigorous analysis of the term, though not an exhaustive one.

Part IV

Philosophers often begin an analysis of authority by contrasting two types of authority that may be attributed to persons: someone's being *an* authority and someone's being *in* authority. The former type of authority may be described as "personal" in character while the latter type of authority may be considered a function of one's position or office.³⁰ Although this distinction is not exhaustive of the types of authority, it can be useful in analyzing a notion of authority such as Hart's, which appears to be ambiguous in its usage. What we propose to do here is to examine what *type* of authority Hart believes legal rules and, derivatively, the decisions of courts to have, by seeing how Hart's notion of authority fits into the framework of the traditional distinction just noted. In this way, we may be able to determine whether in fact Hart's use of the term *is* ambiguous, or whether his usage simply requires an expansion of the usual distinction made between two types of authority in order to include a third type.

Let us begin by considering whether or not Hart's notion of authority is meant to convey the fact that certain individuals are authorities or that their judgments are "authoritative" in virtue of their possession of some property or characteristic. Using the schema provided by Dr. Gary Young in his provocative article on authority,³¹ and plugging in our own terms, this first sort of authority may be illustrated by the following sentences.

- 1) Judge Smith is an authority on United States Constitutional Law.
- 2) Judge Smith has (some) authority as a constitutional lawyer.
- 3) Judge Smith's decisions on United States Constitutional Law have (some) authority.
- 4) O.K., Judge Smith, I believe you are making the correct decision; after all, you're the authority on United States Constitutional Law.

Judge Smith is considered to be *an* authority by virtue of his possession of an extensive knowledge of a particular field, viz., United States Constitutional Law. It's not the case that Judge Smith has bits and pieces of information that he has accumulated over the years about what rules are valid law and how the legal system, of which he is an official, works. Rather, Judge Smith is *an* authority in virtue of his systematic, unified, and coherent body of knowledge about a determinate subject matter, viz., United States

Constitutional Law. Moreover, the fact that Judge Smith is such an authority seems to suggest that we ought to listen seriously to what he has to say about things relating to that subject matter.

To be sure, Hart need not deny that his use of the term authority includes the above sense of the term. In fact, given the qualification of the authority cited in terms of degrees (as indicated by the second and third sentences), Hart would probably agree that the interpretation of the usage is correct. But this cannot be all Hart means when he uses the word authority in the context of judicial decisions, or with regard to decisions or judgments rendered by other "officials" of the legal system. For surely, Hart would acknowledge cases in which a judge's decisions reflect a *lack*, or a *deficient degree*, of knowledge about the subject matter in question. (In this case, perhaps an instance in which a judge confuses the United States Constitution's fifth and fourteenth amendments, or an instance in which a judge is not aware of previous cases that could be cited as precedent for deciding the case before him one way rather than another.³² In such cases, Hart's thesis would nonetheless be able to countenance the judge's decisions as "authoritative." Therefore, it seems that Hart's notion of authority might be closer in meaning to what philosophers have called being *in* authority, which may be illustrated by the following sentences.³³

- 5) Judge Smith is in authority here.
- 6) United States Supreme Court Justice Smith is in (or has) authority over the municipal court judges.
- 7) Judge Smith has the authority to award damages to the person bringing suit against me.
- 8) The authorities are looking for you.
- 9) Judge Smith abused (misused) his authority.
- 10) Judge Smith has just exercised his authority.

These sentences illustrate the notion of a person or persons being *in* authority simply by virtue of occupying a certain position or office in some sort of political, legal, or social institution that (inevitably) seems to have a hierarchical structure.³⁴ Such persons may be said to *have* or *possess* authority which they do or can *exercise over* others—usually those who are below them in the hierarchical structure. Parents, teachers, corporate executives, army majors, judges, dissertation advisors, a Roman Catholic Bishop, and other government officials or bureaucrats are persons who may be said to be *in* authority. The kind of authority these persons have attaches to the position or office they hold and is only derivatively possessed by them; if they leave the position they occupy, they also lose their authority derived from that position. Of course, such persons upon leaving their position or office, may retain another kind of authority that is independent of positions and offices within an institution. A judge may leave office and, therefore, lose the authority he had over others, e.g., to award damages or to mete out criminal sentences. However, the same judge may remain *an*

authority on some particular aspect of the law. On occasion, a person may become *an* authority in virtue of occupying a certain office. For example, a judge may become an authority on labor law as a result of presiding over hundreds of cases involving collective bargaining agreements and grievance arbitration awards. However, the judge remains an authority on labor law even after his term on the court expires, hence showing the independence of being *an* authority from being *in* authority. We also see the independence of these two types of authority by examining our ordinary speech. As Dr. Young observes, "We never or rarely speak of *an* authority as such *exercising* or *having* or *holding* authority, or *misusing* or *abusing* authority—though we do say that the *opinions* of an authority (i.e., those opinions about the matters on which he or she is an authority) *have* authority, and that an authority can *misuse* (though not *abuse*) his or her knowledge."³⁵

Now I think it is obvious that Hart's use of the word authority in the context of judicial pronouncements and other "official" decisions, intends to convey the meaning expressed by the phrase "being *in* authority." Hart's concept of a legal system is certainly a hierarchical one in which certain individuals referred to as "officials" *have* or *possess* the authority (even despite their possible lack of adequate knowledge about the functions of a legal system), to issue norms to those in a subordinate position to them. The secondary rules of adjudication create such positions of authority. It seems however, that this type of authority is also inadequate to account for the way in which Hart views the nature of authoritative norms and pronouncements. This is so because this second type of authority has not, as yet, been clearly marked off from the *power* often found lying behind the authority said to be attached to the position or office in question. In other words, it is difficult to think of a person being *in* authority *without* having access to power of some kind; i.e., power in the form of sanctions (either positive or negative, or both) that can be used against subordinates who do not comply with the system's or institution's rules. And we must be careful in our interpretation of Hart not to draw too close a connection between the fact that certain norms have an authoritative status and the fact that those issuing such norms have the authority to do so in virtue of their access to power of some kind. For, given Hart's efforts to make a significant departure from Austinian positivism and that view's notion of the "coercive superiority" of law, we can be sure that Hart's concept of authority as it applies to legal rules and derivatively, to judicial pronouncements is at least intended, despite its ambiguity, to mark the ways in which conduct is guided or regulated *without* recourse to power—whether that takes the form of coercion, physical force, propaganda, or other psychological and social influences. If Hart's concept of authority can be explicated at all in terms of the notion of "B does what A tells B to do 'merely because A tells B to do it,'" it would be possible only if the "merely because" description of the relation between A and B, given Hart's thesis, is reducible to one of the following forms:

- 1) A "is someone who has extensive knowledge of some field or subject matter S, where S is sufficiently relevant to the question of whether or not to do X (or whether p or not-p) that such a person should know whether or not I (viz., B) should do X (or whether p or not-p),"³⁶ or,
- 2) A is someone who occupies a position or office O, within a hierarchical structure, such that pronouncements from O are sufficiently relevant to the question of whether or not to do X (or whether p or not-p), that such a person should know whether or not I (viz., B) should do X (or whether p or not-p).³⁷

The first form of this "merely because" description of A is clearly an expansion of the statement "A is *an* authority." The second form of A's description is an expansion of the statement "A is in (or has) authority (over others)." If we don't make either one or both of these reductions in interpreting Hart, we would then have to attribute authority to the gunman who says to B, "Give me your money or I'll blow your brains out," since the unqualified "merely because" clause would apply to this situation as well; i.e., B could be said to have handed his money to A, the gunman, "merely because" A told him to. But surely, Hart does not maintain that a judge's decisions are authoritative in the same way in which we would have to countenance the gunman's orders as authoritative in the absence of the expanded formulations just presented. Hart does not view judicial decisions as authoritative insofar as persons who do not comply with them will be thrown in jail, or insofar as most persons fear that they'll be thrown into jail if they don't comply with the system's rules. It may be a fact that all of the legal system's officials with whom we are familiar have access to power of some kind. However, to construe Hart's thesis as a significant departure from Austinian positivism, we must view Hart as holding that the officials, unlike the gunman, "get their way" (or, perhaps, "ought to get their way") *not* because they can or do exercise power over others, but because of some other characteristic they possess, e.g., extensive knowledge or expertise of some sort, or because they occupy a certain position or office within the system's hierarchy.

In conclusion, it should be remembered that Hart explicitly states that the validity of a rule of law must be distinguished from the rule's effectiveness, or lack thereof. Recalling what was previously noted, Hart maintains that there is no necessary connection between the validity of a rule and its effectiveness, except for those cases in which the system's rule of recognition requires that a rule be efficacious, if it is to be a valid rule of the system. It is merely an empirical fact that in many cases we *presuppose* the general effectiveness of a system of law in saying that it is valid. Since, according to Hart, the *source* of a rule's authority is its validity—i.e., it is "authoritative" only insofar as it is valid—the rule's authority must also be independent of its effectiveness. That is to say, although in many cases we may presuppose the general effectiveness of a system of law in recognizing its norms as authoritative, we can nonetheless maintain that the norms are authoritative

despite their possible lack of efficacy. (Hart maintains that statements regarding the "authoritative status" of norms within a legal system are internal statements, while those concerning the effectiveness of norms within the legal system are external statements.)

To be sure, Hart could have said that the validity of a particular rule of law, and, derivatively, its authoritative status, originates from the fact that it has been determined by a given procedure, hierarchical in character, with some quality of effectiveness or efficacy built in, such that the rule *is* valid (i.e., the rule is said by the system's officials to satisfy a set of criteria specified by the rule of recognition). The problem with this construal, of course, is that it seems odd for Hart to employ such a value-laden word as "authority" when making such claims: the word "validity" would have sufficed. I am therefore left to conclude that, given his consistent efforts to depart sharply from the Austinian brand of legal positivism, either there may be a more substantive notion of authority implicit in Hart's use of the term than I have thus far been able to uncover, or (what seems to me more likely to be the case) Hart's analysis of the concept of law completely fails to allow him to reject the notion that law consists of a system of norms possessing "coercive superiority."³⁸ Despite the elaborate analysis of the concept of law in Hart's text, no significant advance appears to have been made beyond the doctrine of Austin.

NOTES

1. See David Richards, *The Moral Criticism of Law* (Encino, California: Dickenson, 1977), pp. 18-19, for a clear discussion of other reasons why many legal philosophers have abandoned Austin's formulation; among them, accounting for the feature that certain laws confer powers, the feature of the continuity of legal systems over time, the problem of identifying the sovereign, etc.
2. *Ibid.*, p. 19.
3. H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961), p. 20.
4. One exception seems to be Michael Payne, in his paper, "The Basis of Law in Hart's *The Concept of Law*", *The Southwestern Journal of Philosophy* 9, no. 1 (Spring 1978): 11-17.
5. See, among others, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979); and Theodore M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* (Stanford, California: Stanford University Press, 1978).
6. Hart, *The Concept of Law*, p. 91.
7. According to Hart, not all social rules are primary rules of obligation. See *The Concept of Law*, pp. 83-89ff. On p. 84, Hart says that "Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great." And, "What is important is that the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations."
8. *Ibid.*, pp. 89-90.
9. *Ibid.*, p. 89.
10. *Ibid.*, p. 90.
11. *Ibid.*, pp. 90-91.
12. *Ibid.*, p. 91.
13. *Ibid.*, p. 91.

14. *Ibid.*, pp. 92, 93, where Hart speaks of a legal system exhibiting a "mark" of authority.
15. *Ibid.*, p. 97.
16. *Ibid.*, p. 97.
17. *Ibid.*, p. 97.
18. *Ibid.*, p. 99.
19. *Ibid.*, pp. 196-97.
20. *Ibid.*, p. 113.
21. *Ibid.*, p. 107.
22. *Ibid.*, pp. 112-13.
23. See Peter Winch, "Authority," *Proceedings of the Aristotelian Society*, Supplementary Vol. 32, July 1958, pp. 225-40; *Symposium on Authority* (London: Harrison and Sons). Winch maintains here that "To participate in rule-governed activities is, in a certain way, to accept authority. For to participate in such activity is to accept that there is a right and a wrong way of doing things, and the decision as to what is right and wrong in a given case can never depend completely on one's own caprice," (p. 228).
 Cf. Hannah Pitkin, "Obligation and Consent - II," *American Political Science Review* 60 (1966): 39-52. Pitkin maintains that the "answer" to the question "Why am I (ever) obligated to . . . obey laws?" is "that this is what . . . 'genuine authority' means. It is part of the concept, the meaning of 'authority' that those subject to it are required to obey, that it has a right to command," (p. 48).
24. Hart, *The Concept of Law*, p. 207.
25. Robert Paul Wolff, *In Defense of Anarchism*, (New York: Harper Torchbooks, 1970), pp. 8-10.
26. See M. B. E. Smith, "Wolff's Argument for Anarchism," *Journal of Value Inquiry* 7, no. 4 (Winter 1973): 290-95. Smith distinguishes between a "*prima facie*" obligation and a "binding" obligation. "A person S has a binding obligation to do an act X, if, and only if, S's failure to do X is wrong . . . and . . . S has a *prima facie* obligation to do X if, and only if, there is a moral reason for S to do X which is such that, unless there is a moral reason for S not to do X, at least as strong as his reason to do X, S's failure to do X is wrong," (p. 291).
27. I am using here the terminology provided by Richards in his account of Hart's concept of law in Richards' book, *The Moral Criticism of Law*.
28. Cf. Hans Kelsen, *General Theory of Law and State*, trans. A. Wedberg (Cambridge: Harvard University Press, 1946). In this book, Kelsen, perhaps the most influential legal theorist of the twentieth century, offered a positivist account of the nature of law. According to his thesis, the effectiveness of laws do not confer validity upon them. Rather, validity is ultimately derived from what Kelsen calls the "Basic Norm" of the given system. Moreover, the validity of the Basic Norm is said by Kelsen to be *presupposed*; its validity is not derived from some sort of moral or ideological norm.
 In a more recent article Kelsen maintains that a Basic Norm is presupposed by any person who views a particular effective coercive order to be a system of valid laws. However, in this paper, Kelsen also maintains that although persons may consider the system to possess *binding* norms, these same individuals—whether they be officials or mere citizens—need not consider this system to be a "legal" one; they can, if they choose to, simply view it as a more extensive bandit gang. See Kelsen, "On the Pure Theory of Law," *Israel Law Review* 1 (1966): 1-7.
29. For a *de facto* concept of authority, see Bertrand de Jouvenel, *Sovereignty* (Chicago: University of Chicago Press, 1957), pp. 29-31. De Jouvenel rejects the idea that civil societies emerge through some kind of voluntary association or by external conquest, and holds authority to be "the efficient cause of voluntary associations . . . Everywhere and at all levels social life offers us the daily spectacle of authority fulfilling its primary function—of man leading man on, of the ascendancy of a settled will which summons and orients uncertain wills. . . . Society in fact exists only because man is capable of proposing and affecting by his proposals another's dispositions; it is by the acceptance of proposals that contracts are clinched, disputes settled and alliances formed between individuals. . . . What I mean by 'authority' is the ability of a man to get his proposals accepted."

For a *de jure* concept of authority, see Thomas Hobbes, *Leviathan*, ed. Michael Oakeshott (Oxford: Basil Blackwell, 1960). In his famous discussion of civil society differing significantly from both a "natural whole" like a beehive and a mere "multitude of men," Hobbes claims that such a multitude emerges as an "artificial" person when each man "authorizes" the actions of a representative: "Of persons artificial, some have their words and actions owned by those whom they represent. And then the person is the *actor*; and he that owneth his words and actions is the *Author*: in which case the actor acteth by authority . . . and as the right of possession, is always understood a right of doing any act; and *done by authority*, done by commission, or licence, from his whose right it is," pp 105-106.

R. S. Peters points out that the *de jure* concept of authority as formulated by Hobbes "presupposes a system of rules which determine who may legitimately make certain types of decisions, make certain sorts of pronouncements, issue commands of a certain sort, and perform certain types of symbolic acts." Peters, "Authority," *Symposium on Authority in Proceedings of the Aristotelian Society*, Supplementary Vol. 32, 1958, p. 209.

30. See Gary Young, "Authority," *Canadian Journal of Philosophy* 3, no. 4 (June 1974): 563-83.
31. *Ibid.*, p. 563.
32. Other examples might include a lack of sociological or psychological sophistication in presiding over desegregation cases or affirmative action cases; or, perhaps where the judge is unaware of the latest technological advances that might warrant making one kind of judgment rather than another—for example, where a judge presiding over anti-trust cases ought to be, but is not, aware of the developments in computer technology which have changed the very nature of doing business.
33. Again, we make use here of the schema provided by Dr. Young, "Authority," p. 564.
34. See Hannah Arendt, "What Was Authority?," *Nomos I: Authority* (Cambridge, Mass: Harvard University Press, 1958), pp. 81-112. Arendt claims that authority is *always* hierarchical in nature.
35. Young, "Authority", p. 565.
36. *Ibid.*, p. 569.
37. This formulation is based on Young's discussion concerning *an*-authority and *in*-authority. See "Authority," p. 576.
38. There is another way of construing the problem about authority which confronts Hart and other legal positivists: the inability to formulate a *non-coercive* concept of *in*-authority which could be used to explain Hart's employment of the term while keeping the concept of authority independent of the notions of coercion or power. If Hart could formulate such a concept of non-coercive *in*-authority, he would then be successful in his attempt to mark off the concept of law as possessing "authoritative superiority," from that of Austin's which views law as possessing "coercive superiority." Although I think that any concept of non-coercive *in*-authority is probably reducible (depending upon the circumstances) to either "*an*-authority" or "*in*-authority," Dr. Young's discussions and speculations about this notion should be considered. For, even if I am correct, Dr. Young's imaginative construction of a dual concept of *in*-authority succinctly captures what legal positivists *would like to think they mean* when they speak about the law being "authoritative." See Young, "Authority," pp. 578-79.